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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973.

No. 73-1974

GARCY CORPORATION,

Plaintiff-Respondent,

vs.

THE HOME INSURANCE COMPANY, CENTENNIAL INSURANCE COMPANY, RELIANCE INSURANCE COMPANY, GREAT AMERICAN INSURANCE COMPANY, ROYAL INSURANCE COMPANY, LIMITED AND MARYLAND CASUALTY COMPANY,

Defendants-Petitioners.

PETITION FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH JUDICIAL CIRCUIT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Chief Justice and Associate Justices of the Supreme Court of the United States.

Petitioners respectfully pray for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

THE OPINION BELOW.

The opinion of the United States Court of Appeals for the Seventh Circuit in the cause therein, numbered 73-1298 was written by Circuit Judge Sprecher and concurred in by Circuit Judge Pell and Senior Circuit Judge Castle. The opinion which is appended hereto in Appendix A, *post*, had not been officially reported at the time of the printing of this petition. The opinion of the United States District Court for the Northern District of Illinois, Eastern Division, which was written by District Judge J. Sam Perry and which the Court of Appeals reversed, is reported at 353 F. Supp. 329 (set forth in Appendix D).

GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

(i)

The judgment of the United States Court of Appeals in this cause was entered on the 7th day of May, 1974.

(ii)

The timely petition for rehearing with the suggestion that the matter be heard by the Court *in banc* was denied on the 5th day of June, 1974.

(iii)

The jurisdiction of this Court is invoked under United States Code, Title 28, Section 1254, which provides for the review of decisions of the United States Court of Appeals by a Writ of Certiorari granted upon petition.

QUESTIONS PRESENTED.

The District Court of the Northern District of Illinois, Eastern Division entered summary judgment for petitioner in this diversity case which is concededly governed by Illinois law, under the Illinois rule, established by an intermediate Court of review and acknowledged by three other federal district Court judges sitting in Illinois, that an insured under a fire insurance policy has relinquished his insurable interest in and cannot recover for the destruction of a building under circumstances where the insured had, prior to the fire, entered into a binding contract for the demolition thereof. Impliedly adopting the position of plaintiff respondent herein that said contract was a "mere piece of paper" (p. 31 of plaintiff's opening brief filed in the Court of Appeals), the United States Court of Appeals for the Seventh Circuit reversed that decision.

That reversal presents the following for review.

The case is an instance of a growing jurisprudential conflict between the federal and state Court systems. It again appears, as it did prior to this Court's ruling in *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1937), that in diversity cases, there are two separate systems of justice—that of state law as established by the state Court—and that created by the federal Courts' application of those notions of justice most consonant with the Courts' predelictions. The manifestation of this problem in the instant case presents three questions for review:

A. Whether this Court's 1940 decision in *West* v. *American Telephone & Telegraph Co.*, 311 U. S. 223, 61 S. Ct. 179, 85 L. Ed. 139, 145, wherein this Court held that a federal Court "is not free to apply a different rule however, desirable it may believe it to be, and even though it may think that the state

Supreme Court may establish a different rule in some future litigation", remains a viable and enforceable guideline in diversity cases which serves to protect the rightful independence of state governments and to insure comity between those governments and the federal judiciary.

B. Whether the Court of Appeals' refusal to apply Illinois law constituted a violation of the tenth Amendment to the United States Constitution and further whether said refusal was an unjust discrimination against those subject to diversity jurisdiction and thereby—in contravention of the constitutional safeguards of the Fifth Amendment—rendered due process and equal protection of the law impossible.

C. Whether diversity jurisdiction should continue to be exercised or whether, in view of the Court of Appeals' election, implicit in its approbation of the view that a contract is a "mere piece of paper", to vitiate an intrinsic principle of Illinois law—the inviolability of contract, the Court of Appeals should have exercised the proper respect for the rightful independence of state governments and fostered the smooth functioning of the federal judiciary by applying the doctrine of abstention.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

CONSTITUTIONAL PROVISIONS:

The Fifth Amendment to the Constitution of the United States, the pertinent part of which reads:

> ". . . nor shall any person . . . be deprived of . . . property, without due process of law;[1] . . ."

The Tenth Amendment to the Constitution of the United States which reads:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."

STATUTORY PROVISION INVOLVED:

United States Code, Title 28, Section 1652 (commonly known as Section 34 of the Judiciary Act) which provides:

> "The laws of the several states, except where the Constitution or treaties of the United States, or Acts of Congress otherwise require or provide, shall be regarded as rules or decisions in civil actions in the Courts of the United States, in cases where they apply."

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1. While the Fifth amendment to the United States Constitution does not contain an explicit safeguard of an equal protection clause, such protection is generally derived from the "due process" clause of that amendment. *Bolling* v. *Sharpe*, 347 U. S. 497, 98 L. Ed 884, 74 S. Ct. 693 (1954).

STATEMENT OF THE CASE.

The Building Complex.

This is an action by respondent to recover for damage to its property under policies of fire insurance issued by petitioners. The property insured was a complex of seven buildings, which included a 7-story building, a 4-story building, a 2-story building, a 1-story building, a quonset hut and other improvements located on a large parcel of real estate within the City of Chicago. The complex was described both in the policies and in the complaint as the building complex upon the premises bounded by the following street addresses.

North
1601-25 West Bloomingdale

East	West
1744-1758 North Ashland	1749-1759 North Mansfield

The Demolition Contract.

On May 5, 1970 respondent entered into a written contract with Three Oaks Wrecking & Lumber Company covering the entire complex of buildings. The complex was to be demolished in its entirety and removed. The contract stipulated that all salvage belongs to the wrecking company (Doc. 13, Stafford Aff. p. 2).

The Partial Performance of the Contract.

The wrecking company entered the premises on or about June 25, 1970, which was twelve days before the fire, and immediately commenced its demolition and wrecking operation. The contractor had completed demolition of portions of the complex and was in the process of demolishing other portions

thereof at the time the fire occurred. Demolition of the building upon which respondent now bottoms its claim had not yet begun. Plaintiff had certain personal property in that building and Three Oaks worked on the other buildings first to give respondent an opportunity to remove that property (Doc. 13, Stafford Aff. p. 2; Doc. 19, Kurtzon Aff. p. 4 and Riccio Aff.). Plaintiff had effectively cancelled insurance on those contents (Doc. 13, McNeal Aff., p. 2).

Respondent's "Proof" Re the Effect of the Demolition Contract.

An affidavit filed by Mr. Kurtzon, an assistant to the president of the respondent corporation, stated that during demolition process "Garcy was desirous and hopeful of selling the 7-story building" (Doc. 19, Kurtzon Aff., p. 5).

Plaintiff's Notice of Cancellation.

On June 25, 1970, Mr. Kurtzon wrote a letter which he addressed and sent to both respondent's agent and an agent for petitioners. That letter stated in pertinent part:

> "We are vacating our Ashland Avenue building and demolition is beginning immediately. Therefore, I am returning our fire insurance policies which can be cancelled immediately . . ." (Doc. 13, Ex. "A").

Respondent made the following concession at page 45 of its opening brief, which was filed in the United States Court of Appeals:

> "It may . . . be conceded that . . . a notice of cancellation does effect cancellation when it is received by the insurance company, and that once received, it cannot be revoked."

The Court of Appeals ruled that the letter of June 25, 1970 *was received* by defendants' agent for the purpose of vitiating defendants' defense of increase of hazard, but was not received

by defendants' agent for the purpose of cancellation of the policies—notwithstanding petitioners' position that that letter *could not be both received and not received by the same agent.*

The Prior Lawsuit.

This is a highly unusual case. The same claim was presented, albeit by a different claimant, respondent's mortgagee, in *Aetna State Bank* v. *Maryland Casualty Co.*, 345 F. Supp. 903. The claimant in that case, Aetna, represented by the law firm of Jenner & Block, presented the identical claim which is now before this Court, i.e., the loss allegedly sustained because of damage by fire to the building complex owned by the respondent corporation and upon which Aetna held a mortgage in the amount of $249,843.06.

The Issue.

The primary basis for petitioners' motion for summary judgment both in the instant case and in the *Aetna* case was that respondent had no insurable interest. In other words, the respondent corporation (and consequently those who derived their rights from respondent, i.e. Aetna) should not be indemnified for a non-existent loss. It is petitioners' position that respondent did not suffer a pecuniary loss under the circumstances of the instant case where respondent had entered a binding contract for the demolition of the entire complex, that contract had been substantially performed before the fire and respondent had thereby contractually abandoned all salvage in the complex to the contractor.

The Law of Illinois.

In *Lieberman* v. *Hartford Fire Insurance Co.*, 6 Ill. App. 3d 948, 287 N. E. 2d 38 (1972), Illinois held that the insured under a fire policy could not recover for damage to its property which occurred at a time when the insured was bound by an

agreement with a contractor for the demolition of those premises. The Court stated at 6 Ill. App. 3d 950:

> "At the time of the fire, plaintiff's interest was, for all practical purposes, eliminated *in that he was bound by the contract with Comet Builders* to have the structure demolished. The destruction of the building was not 'economically disadvantageous' to plaintiff; he would have gained no advantage by continued existence of the structure and suffered no loss by its destruction." (Emphasis supplied.)

The Ruling in Aetna.

Upon consideration of the foregoing circumstances and the Illinois law applicable thereto, Judge Marovitz concluded in the *Aetna* case at 345 F. Supp. 908:

> "It would indeed be ludicrous to apply a principle which includes a replacement value to a case where the insured was himself already in the process of paying a wrecker to do what the fire did for him for nothing. To allow almost a quarter of a million dollars to be paid for buildings that were valueless and whose duration of existence was governed solely by the rapidity of the swing of the wrecker's ball which was operating at the behest of the insured and with the acquiescence of the mortgagee would indeed produce a grossly inequitable result."

The plaintiff's mortgagee, by its attorneys, Jenner and Block, declined to prosecute an appeal from Judge Marovitz's ruling. By its ruling in the instant case, the Court of Appeals circumvented Judge Marovitz's ruling and allowed the respondent to act as a conduit to pay the mortgagee from the proceeds of petitioners' policies, the amount to which the mortgagee was determined not to be entitled.

The Ruling of the District Court in the Instant Case.

In the decision reported at 353 F. Supp. 329, Judge Perry denied respondent's cross motion for summary judgment, granted

petitioners' motion and entered judgment for petitioners. His Honor stated at 353 F. Supp. 333:

> "The plaintiff attempts to distinguish the holdings in *Aetna* and *Lieberman* by stating that the actual wrecking operations had not commenced on the particular building upon which this suit is claimed to have been brought. It is conceded that the wrecker had commenced operation on the complex of buildings and that the building concerned would be wrecked during the course of this operation. The Court is not convinced by this argument. As Judge Marovitz stated in *Aetna:* 'To allow almost a quarter of a million dollars to be paid for buildings that are valueless and whose duration of existence was governed solely by the rapidity of the swing of the wrecker's ball . . . would indeed produce a grossly inequitable result'."

The Reversal by the Court of Appeals.

Reversing the judgment which had been entered by Judge Perry, the Court of Appeals held that in order for the demolition contract to be legally significant, it would be necessary for it to be "irrevocable". In the Court's view, it was not "irrevocable" so long as respondent was physically capable—notwithstanding the illegality of his act—to breach that contract. The Court stated at page 4 of its opinion:

> ". . . The 7-story building was in use as a warehouse for inventory and equipment. Plaintiff hoped to sell it in the weeks before the wrecking crew could reach it. It had not been stripped of salvageable material or prepared for demolition. *Plaintiff could have halted demolition, although it might have been liable in money damages to the contractor. In short, the 7-story building was not in the process of demolition.*" (Emphasis supplied.)

In the *Lieberman* case, as is demonstrated *post*, the demolition contract was not "irrevocable" in the sense which the Court of Appeals would require. Only token demolition work had been completed. The *Lieberman* Court bottomed its decision

solely upon the insured's *legally binding contractual obligation* to demolish. That and that alone was the basis for the Court's decision.

Basis for Federal Jurisdiction.

The basis for federal jurisdiction in the district Court was diversity of citizenship and the requisite jurisdictional amount.

ARGUMENT.

ILLINOIS LAW ESTABLISHES THAT RESPONDENT IN THE INSTANT CASE HAD NO INSURABLE INTEREST IN THE PREMISES, TO-WIT: A PECUNIARY INTEREST IN HAVING SAID PREMISES RETAIN ITS STRUCTURAL INTEGRITY. THE COURT OF APPEALS' REFUSAL TO BE BOUND BY ILLINOIS LAW IS VIOLATIVE OF THAT PRINCIPLE FOUNDED IN CONSTITUTIONAL SAFEGUARDS THAT, FOR THE PURPOSES OF DIVERSITY JURISDICTION A FEDERAL COURT IS, IN EFFECT, ONLY ANOTHER COURT OF THE STATE.

A. The Court of Appeals' "Distinction" of Lieberman Is Illusory; the Court Simply Substituted Its Own Opinion for Illinois Law Which Here Required the Entry of Judgment for Petitioners.

Lieberman v. *Hartford Fire Insurance Co.*, 6 Ill. App. 3d 948, 287 N. E. 2d 38 (1972) cannot be distinguished as stated at page 5 of the Court of Appeals' opinion, upon the basis that there was "an irrevocable commitment to demolish". In Illinois a legally binding contract is inviolable. The stipulations of the parties are given effect as written and will not be rewritten by the Court. *Crosse* v. *Supreme Lodge Knights and Ladies of Honor*, 254 Ill. 80, 98 N. E. 2d 261 (1912): *Thompson* v. *Fidelity & Casualty Co.*, 16 Ill. App. 2d 159, 148 N. E. 2d 9, pet. lv. app. den. 13 Ill. 2d 628, cert. den. 358 U. S. 837 (1958). The Court of Appeals' suggestion that the contract becomes significant only if the demolition work had been performed upon the 7-story building is plainly wrong. In Illinois, the legal efficacy of an agreement has never been dependent upon the nature of the remedies available in the event of breach or upon the degree to which the contractual obligations have been performed.

Accordingly, as the *Lieberman* Court plainly stated, that decision was bottomed upon the fact that plaintiff therein "was bound by the contract with Comet Buildings to have the structure demolished". The Court of Appeals' view of *Lieberman* —notwithstanding the *Lieberman* Court's explicit pronouncement—is factually unsound. Only token work had there been performed. Certainly the work performed had not reached the "point of no return". There was expert testimony in the record (E 18) which established that at the time of the fire the building was structurally sound. The contract in *Lieberman* was irrevocable only in the sense that the contract in the instant case is irrevocable, to-wit: because a party's violation thereof is illegal and if he breaches, he will be bound by the appropriate judicial sanctions.

In *Lieberman,* the circumstances were strikingly similar to those before this Court. The plaintiff presented a claim upon a policy of fire insurance, the terms of which were identical to those of the policies before this Court. The insurers undertook to "insure the insured . . . against all direct loss by fire . . . to the property described . . ."

Plaintiff was the lessor on a lease which provided that the lessor was to construct a new building to be occupied by the lessee in place of the one then standing on the premises. The lease also provided that the lessor could retain a portion of the west wall of the existing building for use in the new structure. The lessor entered a contract with Comet Builders for the erection of the building required by the lease and for the demolition of the existing building. The demolition contract was subcontracted by Comet to Three Oaks Wrecking & Lumber Company.

Demolition began on or about October 14, 1965. Although the plaintiff had at that time stopped using the building as a place of business, he had not yet removed his personal property. The fire occurred on October 17, 1965, at which time the demolition was in its early stages.

After the fire, the walls, including the one which according to the contract was to be left standing, had to be taken down. Moreover, because of the fire, the value of the salvage was $1,500.00 less than it would have been had there been no fire. Nevertheless, as in the instant case, the salvage from the demolished building was to go to the wrecking contractor—not to the plaintiff.

Upon reviewing the applicable authorities the Illinois Court concluded that despite its technical ownership of the property plaintiff had no insurable interest therein and thus there was no basis upon which to predicate recovery. The Court held:

1. An insurable interest is a pecuniary interest in the continued existence of the property.
2. An insurance contract is a contract of indemnity and thus one must have an insurable interest in order to make a claim thereunder.
3. One who has no insurable interest has suffered no loss and may not recover under the policy.
4. Plaintiff's insurable interest was for all practical purposes extinguished by the contract for demolition.

The Court stated at 6 Ill. App. 3rd 949-950:

"Recovery under the policy is limited in that it could not be 'for more than the interest of the insured against all direct loss by fire'. In Couch on Insurance 2d par. 24:13, an interest of the insured is described thusly:

> 'Generally speaking, a person has an insurable interest in property whenever he would profit by or gain some advantage by its continued existence and suffer loss or disadvantage by its destruction.'

"As otherwise stated by Hartnett and Thornton, Insurable Interest in Property: A Socio-Economic Reevaluation of a Legal Concept, 48 Colum. L. Rev. 1162, 1164 (1948):

> 'Interest is traditionally defined in terms of rights in the insured property, but it may also be characterized as such a relationship to property as makes a

> happening adversely affecting the insured property economically disadvantageous to the interest-holder.'
>
> "See generally, Home Insurance Co. v. Mendenhall (1897), 164 Ill. 458, 463, 45 N. E. 1078, 1080.
>
> "At the time of the fire, plaintiff's interest was for all practical purposes eliminated in that he was bound by the contract with Comet Builders to have the structure demolished. The destruction of the building was not economically disadvantageous to plaintiff; he would have gained no advantage by the continued existence of the structure and suffered no loss by its destruction. Plaintiff failed to demonstrate that he was in any way injured by the destruction of the building. He did not show that his contract price with Comet Builders was increased as a result of the decreased value of the salvage coming from the building. In a like manner, the record is void of any indication that plaintiff had to pay more for the construction of the new building because the old west wall was not used. Thus plaintiff failed to establish that he had sufficient interest in the premises upon which he could recover under the policy."

An additional point is essential. The Court of Appeals apparently conceded that its decision was in reality a refusal to accept *Lieberman*. At page A5 that Court stated: "Royal Ins. Co. was decided under California law, which, contrary to Illinois law, defines insurable interest as pecuniary interest". On the contrary, the Illinois law upon the subject is explicit. As is demonstrated in Section "C" *post*, an insurable interest exists when the insured derives pecuniary benefit by the continued existence of the property.

That *Lieberman* is an accurate statement of Illinois law which the Court of Appeals should have respected has been recognized by three United States district judges for the Northern District of Illinois—in addition to Judge Perry.

Judge Marovitz's decision in the *Aetna State Bank* case has of course already been alluded to. The same conclusion was

drawn by Judge Will in *Chicago Title & Trust Co.* v. *United States Fidelity & Guarantee Co.*, 72 C 3225, under circumstances where, although demolition had not yet begun, all indications were that demolition would in fact proceed. In that decision, which is set forth in Appendix C, his Honor stated:

> " . . . it is inequitable to award substantial monetary damages to a person to compensate him for what is of no current or present monetary value."

The identical analysis was made by Judge LaBuy in *Greyhound Building Corp. of Chicago* v. *Fidelity Phenix Fire Insurance Co. of New York*, 7 Fire & Casualty Cases 597 (set forth in Appendix "B"). In that case, the plaintiff, who had negotiated for the demolition of buildings which were subsequently destroyed by fire and who brought suit against the fire insurance carrier, *had not* entered into a contract to demolish. Judge LaBuy's analysis of Illinois law is unmistakable. The plaintiff was—*for that reason*—entitled to recover under its contract of insurance. However, *if there had been a contract to demolish*, plaintiff's rights would thereby have been effectively eliminated. The Court stated:

> "Of primary importance in the instant case is the question of whether the abandonment of use as a theatre and building by the plaintiffs had occurred at the time of the fire. . . .
>
> * * *
>
> "If the plaintiff has entered into a binding contract for the demolition of the buildings (before the date of the fire), then it must have been deemed to have abandoned further use of the premises as a theatre and building . . .
>
> * * *
>
> "If plaintiff was legally bound to proceed with the demolition of the building before the date of the fire, the use of these buildings as buildings had terminated and the cost of reproduction thereof cannot be considered in the question of damages . . ."

B. The Refusal to Accept Lieberman Is a Constitutional Abrogation of the Requirement That in Diversity Cases State Law Controls.

The rule that, for purposes of diversity jurisdiction, a federal Court is to be considered simply another Court of the state here bound the Court of Appeals to apply the *Lieberman* rule under this Court's pronouncement in *West* v. *American Telephone & Telegraph Co.*, 311 U. S. 223, 61 S. Ct. 179, 85 L. Ed. 139, 144 (1940) wherein this Court stated:

> "A state is not without law, save as its highest court has declared it. There are many rules of decision commonly accepted and acted upon by the Bar and inferior Courts which are nevertheless laws of the state although the highest Court of the state has never passed upon them. In those circumstances a federal court is not free to reject the state rule merely because it has not received the sanction of the highest state court, even though it thinks the rule is unsound in principle or that another is preferable. State law is to be applied in the federal as well as the state courts and it is the duty of the former in every case to ascertain from all the available data what the state law is and apply it rather than to prescribe a different rule, however superior it may appear from the viewpoint of 'general law' and however much the state rule may have departed from prior decisions of the federal Courts. See *Erie R. Co.* v. *Tompkins, supra* (304 U. S. 78; 82 L. ed. 1194, 58 S. Ct. 817, 114 ALR 1487); *Russell* v. *Todd, supra* 309, U. S. 293, 84 L. ed. 762, 60 S. Ct. 527.)
>
> "Where an intermediate appellate state court rests its considered judgment upon the rule of law which it announces, that is a datum for ascertaining state law which is not to be disregarded by a federal court unless it is convinced by other persuasive data that the highest Court of the state would decide otherwise. (Citation of authorities omitted.)"

The purpose of Section 34 of the Judiciary Act (Title 28, Section 1652, U. S. C.) is to avoid the maintenance within a state

of two divergent or conflicting systems of law, one to be applied in the state Courts, the other to be availed of in the federal Courts in case of diversity of citizenship. The unconstitutional character of the conduct thus sought to be eliminated was recognized by this Court in *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1937). The Court of Appeals' decision constitutes both an unreasonable and unlawful discrimination against those subject to federal jurisdiction *and* an abrogation of the right of property in violation of the guarantees of due process under the Fifth Amendment to the United States Constitution. The unfairness of refusing to treat all litigants equally because of the fortuitous circumstance of diversity is compounded by the destruction of petitioners' contractual rights without due process of law. *Guaranty Trust Co.* v. *York*, 326 U. S. 99, 65 S. Ct. 1464, 89 L. Ed. 2079 (1945); *Home Insurance Co.* v. *Dick*, 281 U. S. 397, 50 S. Ct. 338, 74 L. Ed. 926 (1929); *Hartford Accident & Indemnity Co.* v. *Delta & Pine Land Co.*, 292 U. S. 143, 54 S. Ct. 634, 78 L. Ed. 1178 (1933).

C. The Court of Appeals' Disregard of Illinois' Respect For The Integrity of Contracts—Which Is Well Established and Intrinsic to the Law of Illinois—Constitutes an Unwarranted Intrusion of a Federal Court Upon Matters of Domestic Policy. The Court of Appeals Should Have, in Preference to Undertaking Such Course of Action, Applied the Doctrine of Abstention.

The Court of Appeals' adoption of respondent's shocking suggestion that a contract, specifically the contract to demolish, is nothing more than a "mere piece of paper" constitutes an intrusion upon and usurpation of Illinois' domestic policy. In that state a contract is meaningful whether or not it has been substantially or fully performed because it embodies the legal rights and obligations of the parties.

The Court of Appeals' decision runs contrary to Illinois' public policy in an additional sense. In Illinois an insured must have an insurable interest in order to recover.

The requirement of an insurable interest is bottomed upon three indestructible social and economic policies, i.e., policies against (1) general vocational wagering, (2) reward motivating destruction of property and (3) recovery of "damages" in other than a strict indemnity situation. 1957 L. F. 586, 589.

An insurable interest is "such an interest as will make the loss of property of pecuniary damage to the insured". Black's Law Dictionary, 4th Edition, page 942. It may, but does not necessarily, follow legal title. It is to be determined by examining the realities, economic or otherwise, of the situation rather than by merely looking at technical concepts of title. The existence of an insurable interest hinges upon economic interests. *Home Insurance Co.* v. *Mendenhall,* 164 Ill. 458, 45 N. E. 1078 (1897); *Patterson* v. *Durand Farmers Mutual Fire Ins. Co.,* 303 Ill. App. 128, 24 N. E. 2d 740 (1940). The rule was succinctly stated in *Insurance Law & Practice—Appleman,* Volume 4, Section 2123, page 35:

> "The usual rule customarily followed is that an insurable interest exists when the insured derives pecuniary benefit or advantage by the preservation or continued existence of the property or will sustain pecuniary loss from its destruction."

The rule was also set forth in *Illinois Mutual Fire Insurance Co.* v. *Andes Insurance Co.,* 67 Ill. 362, 364 (1873):

> " 'The plaintiff's demand is for an *indemnity;* his action, then, must be founded upon the nature of the damnification as it really is at the time the action is brought . . . It is a contradiction, in terms, to bring an action for *indemnity* where, upon the whole event, *no damage* has been sustained." Accord: *Continental Casualty Co.* v. *Fleming,* 46 Ill. App. 2d 276, 197 N. E. 2d 88 (1964); *Patterson* v. *Durand Farmers Mutual Fire Ins. Co.,* 303 Ill. App. 128, 24 N. E. 2d 740 (1940); *Colgrove* v. *Lowe,* 343 Ill. 360, 175 N. E. 2d 569 (1931).

The Court of Appeals' failure to recognize the Illinois policy interest in restricting coverage to those who demonstrate that they possess an insurable interest coincides with increased public awareness at the present time of the distressed condition of the federal judiciary. The view of Circuit Judge Shirley Hufstedler in her article "Courtship and Other Legal Arts" which appears in the May, 1974 issue of the American Bar Association Journal warrants consideration. Her Honor states at page 546:

> "Judges' responses to excessive pressures are not dissimilar to those of other mortals. They get tired, discouraged, and the work product suffers. The institutional responses, however, are more troubling. We see signs of breakdown because the appellate courts are not able adequately to perform their institutional roles of authoritatively interpreting federal statutes, of formulating and expressing policy on legal issues of system-wide concern, and of supervising each level of the system below them. Increased reliance on law clerks' work, the issuance of cryptic dispositions of appeals, and the diminution of oral argument —as necessary as they have been to move these litigation mountains—have produced the deleterious side effect of lowering the profile of justice. The consequences are an erosion of the bar's confidence in the intellectual integrity of the appellate judicial process and a reduction of public confidence in the fairness of the federal courts.
>
> "Although the impact of these reactions defies quantification, I believe that they threaten the very foundations of the system. The great force of the federal judiciary has derived in large measure from the convictions of the bar and the public that the federal appellate courts were intellectual and moral legal bulwarks. And those convictions have been based largely on the traditional practices of federal appellate judges to read the briefs personally, to participate in oral argument, and to express their judgments in thorough published opinions—all of which have made the decisional process both human and visible.
>
> "Another symptom of systemic distress is the increasing evidence of intra—and intercircuit jurisprudential conflict and disharmony. . . ."

Petitioners respectfully submit that the answer to the foregoing may lie in a more liberal application of the doctrine of abstention and further that the instant case is an appropriate one for such application.

In *Lehman Brothers* v. *Schein*, 42 Law Week 4603 (1974) this Court recognized that the doctrine must be expanded to apply beyond the circumstances to which it has traditionally been limited.

For instance, a certification statute is not a prerequisite to abstention. Appropriate procedure for application of the doctrine in the instant case would be reversal and remandment with instructions that the Court dismiss the claim without prejudice and that respondent file an appropriate action in the Illinois state Courts. *Wright—Federal Courts*, Section 52 at 200 (2d Ed. 1970); *Barrett* v. *Atlantic Richfield Co.*, 444 F. 2d 38 (5th Cir. 1971).

If this Court so rules, petitioners will of course agree to waive any procedural bar to respondent so proceeding.

Likewise, *Lehman* makes it clear that abstention may be appropriate irrespective of the absence of the traditional circumstance in which it has been applied, to-wit: where application is necessary to avoid consideration of a constitutional issue. The difficulty of the question of state law presented can be a compelling basis for abstention.

Petitioners respectfully submit that Illinois law is perfectly clear on the question presented. However, should petitioners be in error in this regard then the question can only be considered, as it was described by the Court of Appeals, as a most "troublesome" one. That factor, combined with the Illinois public policy interests here involved mark the instant case as an appropriate one for application of the doctrine. *Schenley Industries, Inc.* v. *N. I. Wine & Spirits*, 272 F. Supp. 872, 883 (N. J. 1967); *United States* v. *150.29 Acres of Land, etc. Milwaukee, Wisc.*, 135 F. 2d 878, 881 (7th Cir. 1943). The liberality which the

doctrine should apply was considered in a footnote at page 883 of the *Schenley* decision as follows:

> ". . . the more persuasive view is that the special nature of certain local proceedings involving state policy prerogatives, when joined with difficult questions of state law warrant abstention, although neither individually would suffice."

Under circumstances where a federal Court is unable to discern state law, or stated another way, if a federal Court finds itself unwilling to apply state law as established by the intermediate Courts of the state, then—in order to effect comity between the state and federal judicial systems—the doctrine should be applied. This is especially true under circumstances where the subject matter of the litigation involves a question of importance to the state affected. Although federal Courts are the primary experts on national law, state Courts are the final expositors of the law of the respective jurisdictions.

Few public interests are higher than the avoidance of needless friction with state policies. Restraint is necessary if the federal Courts are to scrupulously respect the rightful independence of state governments and to foster the smooth functioning of the federal judiciary.

The pressing need for application of the doctrine in the instant case was perhaps forecast by Chief Justice Burger in his speech on the state of the American judiciary, which was delivered to the American Bar Association on August 10, 1970:

> "As to the future, I can do no more than emphasize that a federal Court system is for a limited purpose and lawyers, the Congress, and the public must examine carefully each demand they make upon that system . . . We should look more to state Courts familiar with local conditions and local problems." (See *Press* v. *Pasadena Independent School District,* 326 F. Supp. 550, 551, S. D. Tex., 1971).

CONCLUSION.

The Court of Appeals' rejection of Illinois law has singled out and discriminated against petitioners as contrasted with those litigants who are not subject to federal jurisdiction and has unconstitutionally deprived petitioners of a viable defense upon which it would have prevailed in the state Courts.

Wherefore, for the reasons above stated and upon the authorities cited, petitioners respectfully pray that this Honorable Court grant its writ of certiorari to the United States Court of Appeals for the Seventh Circuit and that upon review, the decision below be reversed with directions either that the judgment entered in the District Court for petitioners be affirmed or that the case be dismissed so that it may be prosecuted in the Illinois Courts where it belongs.

Respectfully submitted,

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APPENDIX A.

IN THE UNITED STATES COURT OF APPEALS.
For the Seventh Circuit.

September Term, 1973 — January Session, 1974

No. 73-1298
GARCY CORPORATION,
Plaintiff-Appellant,
v.
HOME INSURANCE COMPANY, *et al.*,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois.
No. 71 C 1573
J. SAM PERRY,
Judge.

Argued February 12, 1974—Decided May 7, 1974

Before CASTLE, *Senior Circuit Judge,* and PELL and SPRECHER, *Circuit Judges.*

SPRECHER, *Circuit Judge.* This appeal presents the troublesome question of the worth of a building that burned down shortly before it was to have been demolished.

Plaintiff owned five buildings in the same block: a seven-story building, a four-story building, a two-story building, a one-story building and a quonset hut. In April, 1970, each of the six defendant insurance companies issued identical policies totaling $300,000 against fire damage to any or all of the five buildings.

In May or June of 1970, plaintiff entered into a contract with a wrecking company for the demolition of all the buildings. All salvage would become property of the demolition company. The wreckers began work during the last week of June; it was estimated the demolition would take 90 days. On July 6, 1970, the company had demolished the quonset hut, the one-story building, part of the two-story building and a small part of the four-story building.

No wrecking or stripping of salvageable material had begun on the seven-story building. It contained $26,000 of inventory and various machinery and equipment.[1] An affidavit of the assistant to the president of plaintiff corporation stated that plaintiff was trying to sell the seven-story building, even while the smaller buildings were being wrecked. The building was listed with real estate brokers. If plaintiff had found a buyer, it would have halted the demolition.

On the evening of July 6, 1970, all the remaining buildings were destroyed by fire. An appraisal submitted by plaintiff placed the actual cash value of the seven-story building before the fire at $633,532. Defendants refused to pay plaintiff's claim for the total amout of coverage, $300,000.

The case was submitted to the district court on motions for summary judgment from both sides. Although the complaint alleges a claim based on loss of all the buildings, plaintiff's motion for summary judgment relies on loss of the seven-story building alone. Defendants' motion seeks judgment on the damages issue on the theory that the seven-story building had no value to plaintiff at the time of the fire because of the contract for demolition.

The district judge's opinion (reported at 353 F. Supp. 329), granting defendants' motion for summary judgment on the damage issue, follows Judge Marovitz' opinion in a related case, *Aetna State Bank* v. *Maryland Casualty Co.*, 345 F. Supp. 903

1. Plaintiff had cancelled its insurance policies on these contents.

(N. D. Ill. 1972). Aetna State Bank, as plaintiff's mortgagee on the buildings, sued the same defendants on the same policies. Judge Marovitz found defendants were liable on the policies, but granted summary judgment to defendants on the damages issue.

The case went to Judge Marovitz on stipulations of fact that apparently treated the five buildings as an indivisible unit.[2] His opinion shows no awareness that the demolition crew had not begun on the largest and most valuable building, nor that plaintiff had not yet removed inventory and equipment from the building, nor that plaintiff was trying to sell the building. On the facts presented to him, Judge Marovitz held:

> We therefore find that actual cash value is not the proper criterion for determining the amount of loss for property which is *in the process* of being demolished and whose demolition at the time of loss is no longer a matter of conjecture or speculation . . . there is nevertheless no compensable loss in view of the fact that there is no value to buildings *in the process* of demolition.

345 F. Supp. 903, 909 (emphasis in original).

Defendants did not plead collateral estoppel of the *Aetna* case aginst plaintiff. Such a pleading would have been inappropriate for two reasons. First, there is no privity between mortgagor and mortgagee; defendants cannot raise collateral estoppel against a party which did not participate in the previous case. 1B MOORE'S FEDERAL PRACTICE ¶ 0.411[12], at 1673 (2d ed., 1974). Second, the difference between the factual contexts eliminates identity of issue on the damages question.

But defendants do rely heavily on *Aetna* as precedent for the present case. We agree with the analysis in *Aetna* that equity

2. Aetna's motivation to treat the buildings as a unit may have been the fact that the amount due on the mortgage on all five buildings was $249,843, which was less than the total coverage of $300,000. Here plaintiff claims the value of the seven-story building alone exceeded $300,000.

will not allow recovery of actual cash value (defined as replacement cost minus depreciation for age) of a building irrevocably abandoned to a wrecking crew. If the case had been presented to us as it was to Judge Marovitz, with no separate information on individual buildings, we probably would have reached the same result.

When the *Aetna* reasoning is applied to the facts as presented here, however, we reach the opposite conclusion. The seven-story building was in use as a warehouse for inventory and equipment. Plaintiff hoped to sell it in the weeks before the wrecking crew would reach it. It had not been stripped of salvageable material or prepared for demolition. Plaintiff could have halted demolition, although it might have been liable in money damages to the wrecker. In short, the seven-story building was not *in the process* of demolition.

A review of similar cases produces an amazing array of analysis, but the critical factual question almost always is whether the insured had abandoned the building pursuant to an irrevocable commitment to demolish it. The following are examples of less than irrevocable commitment. In *Knuppel* v. *American Ins. Co.*, 269 F. 2d 163 (7th Cir. 1959), the court excluded evidence of the owner's intention to demolish a building still in use by his lessee as a tavern and restaurant. A vacant fraternity house, declared a nuisance by the city and ordered demolished, was valued without consideration of the city's resolution in *Bailey* v. *Gulf Ins. Co.*, 406 F. 2d 47 (10th Cir. 1969). Exclusion of evidence of a school board's intent to demolish a school was ruled proper in *American Ins. Co.* v. *Treasurer, School District No. 37*, 273 F. 2d 757 (10th Cir. 1959), because the school was in full use at the time of the tornado. In *American Home Fire Assur. Co.* v. *Mid-West Enterprise Co.*, 189 F. 2d 528 (10th Cir. 1951), a contract by the owner to tear down part of the building for the benefit of the lessee had no effect on the insurable interest, because no physical changes had been made pursuant to the contract.

Evidence of a lessee's plans to demolish buildings he had erected was irrelevant to his insurable interest in *Federowicz* v. *Potomac Ins. Co.*, 7 App. Div. 2d 330, 183 N. Y. S. 2d 115 (1959). A landlord-tenant contract for demolition and replacement of a building was not final in *Leggio* v. *Millers National Ins. Co.*, 398 S. W. 2d 607 (Tex. Civ. App. 1965), so the landlord still had an insurable interest.[3] A contract for demolition, performance of which had not begun, did not affect the insured's interest in *Goodwin* v. *Iowa State Ins. Co.*, 27 S. W. 2d 464 (Mo. Ct. App. 1930).[4]

Examples of abandonment pursuant to an irrevocable commitment to demolish are *Royal Ins. Co.* v. *Sisters of the Presentation*, 430 F. 2d 759 (9th Cir. 1970); *Lieberman* v. *Hartford Fire Ins. Co.*, 6 Ill. App. 3d 948, 287 N. E. 2d 38 (1972); and *Board of Education* v. *Hartford Fire Ins. Co.*, 124 W. Va. 163, 19 S. E. 2d 448 (1942). *Royal Ins. Co.* was decided under California law, which, contrary to Illinois law, defines insurable interest as pecuniary interest. But the same result could be reached following the *Aetna* analysis because the nuns' obligation to allow demolition of the abandoned convent was specifically enforceable. *Lieberman* is also an instance of a contract for demolition which could have been specifically enforced by the contractor for the new building. In addition, the demolition work had actually begun. *Board of Education* v. *Hartford Fire Ins. Co.* turned on the factual determination that plaintiff had permanently stopped using the old school building.[5]

3. The court stated in dictum that an executed contract would have eliminated the landlord's interest, presumably because the tenant would have been entitled to specific performance.

4. Occasional cases find insurable interest or apply actual cash value even when demolition had already begun at the time of the fire. *Eagle Square Mfg. Co.* v. *Vermont Mutual Fire Ins. Co.*, 125 Vt. 221, 212 A. 2d 636 (1965); *Irwin* v. *Westchester Fire Ins. Co.*, 58 Misc. 441, 109 N. Y. S. 612 (1908)

5. Defendants rely on *Greyhound Building Corp.* v. *Fidelity-Phenix Fire Ins. Co.*, 7 Fire & Casualty Cas. 597 (N. D. Ill. 1951), for dictum that, if there had been a binding contract for demolition,

In analogous cases involving not demolition but some other change in circumstance before the damages occurred, courts have considered crucial the finality of the change. Since condemnation proceedings in Illinois may be abandoned by the condemnor, the owner of a condemned building may recover actual cash value even if he has already received a condemnation award. *Edlin* v. *Security Ins. Co.*, 269 F. 2d 159 (7th Cir. 1959), *certs denied*, 361 U. S. 931, 932 (1960); *American National Bank & Trust Co.* v. *Reserve Ins. Co.*, 38 Ill. App. 2d 315, 187 N. E. 2d 343 (1962). A contract to sell does not effect the seller's insurable interest despite full or partial payment of the contract price. *First National Bank* v. *Boston Ins. Co.*, 17 Ill. App. 2d 159, 149 N. E. 2d 420 (1958), *aff'd*, 17 Ill. 2d 147, 160 N. E. 2d 802 (1959); *Dubin Paper Co.* v. *Insurance Co. of North American*, 361 Pa. 68, 63 A. 2d 85 (1949).

In *Chicago Title & Trust Co.* v. *United States Fidelity & Guaranty Co.*, No. 72 C 3225 (N. D. Ill., June 7, 1973), the city had ordered the owner to board up an empty building and not to repair the heating system. It had been gutted by a previous fire. Judge Will, applying the *Aetna* doctrine, held that the definition of actual cash value as reproduction cost minus depreciation "is limited in application to those buildings which are being economically utilized at the time of their damage or destruction." Since plaintiff was using the intact seven-story building as a warehouse and was trying to sell it, it had economic utility.

The district court erred in granting defendants' motion for summary judgment on the damages issue. Since the facts material to this issue are undisputed, the court should have granted

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plaintiff would be deemed to have abandoned the building. The only authority cited in *Greyhound* is *Board of Education* v. *Hartford Fire Ins. Co.*, which certainly does not equate a contract for demolition with abandonment. The two facts were separately determined. We decline to give any weight to the dictum expressed in *Greyhound*.

plaintiff's motion for summary judgment on the damages question.

Both plaintiff and defendants also moved for summary judgment on the issue of cancellation of the policies.[6] Plaintiff sent a letter dated June 25 with the following address and salutation:

> Mr. E. K. Eichengreen
> Rollins Burdick Hunter Co.
> 231 South La Salle Street
> Chicago, Illinois 60604
>
> Dear Ed:

Eichengreen was plaintiff's agent; Rollins Burdick Hunter was defendants' agent. Eichengreen occupied one of a group of offices leased by Rollins Burdick Hunter. The district judge found that the only evidence relied on by defendants to show notice of cancellation to their agent was the June 25 letter. We agree with the district court's analysis of the form and content of the letter and with his finding that it did not effect cancellation of the policies (see 353 F. Supp. 329, 331-32).[7] The judge denied defendants' motion for summary judgment on this ground but failed to rule on plaintiff's motion. Implicit in his discussion of the cancellation issue, however, is a ruling of summary judgment for plaintiff. He should have granted plaintiff's motion on the cancellation issue.

The third issue on which both parties sought summary judgment is whether the increased hazard of the demolition work

6. Again, defendants do not plead collateral estoppel of the statement in the *Aetna* opinion that "it does seem that the mortgagor, GARCY, did request the cancellation of the policies. . . ." 345 F. Supp. 903, 905. The same factors of lack of privity and submission on stipulated facts apply as on the question of damages. In addition, a finding of cancellation by the mortgagor was not necessary to Judge Marovitz' conclusion that such a cancellation would not be effective as to the mortgagee's coverage.

7. We give no weight to the district judge's third reason, an admission in the pleadings that the policies were in effect at the time of the fire.

voided the coverage. The district judge adopted the *Aetna* holding (see 345 F. Supp. 903, 905-06) in denying defendants' motion and again impliedly ruled in plaintiff's favor.

In *Aetna*, Judge Marovitz found that Garcy Corp., the mortgagor, had given defendants notice of its plans for demolition. The finding was necessary to the court's holding that the mortgagee had not violated its duty under the notice provision in the mortgage clause quoted below. Plaintiff asserts collateral estoppel against defendants' present attack on the factual finding of notice of demolition. We believe plaintiff is entitled to invoke collateral estoppel despite the lack of mutuality of privity. *Federal Savings & Loan Ins. Corp.* v. *Hogan*, 476 F. 2d 1182 (7th Cir. 1973); *Factor* v. *Pennington Press, Inc.*, 230 F. Supp. 906 (N. D. Ill. 1963). While plaintiff was not a party to *Aetna*, defendants were; they had a full opportunity to litigate the issue of their knowledge of the proposed demolition. Defendants are now bound by the finding that they had knowledge.

The question becomes the effect of defendants' knowledge of the increased hazard under two provisions of the insurance policies. The first states:

> Conditions suspending or restricting insurance. Unless otherwise provided in writing added hereto this Company shall not be liable for loss occurring (a) while the hazard is increased by any means within the control or knowledge of the insured. . . .

The second provision is part of the standard mortgage clause:

> Provided also, that the mortgagee shall notify this Company of any . . . increase of hazard which shall come to the knowledge of said mortgagee . . . and the mortgage shall, on demand, pay the premium for such increased hazard for the term of the use thereof; otherwise this policy shall be null and void.

Aetna holds that notification by the mortgagor satisfied the mortgagee's obligation under the latter provision. Since the defendants knew of the increased hazard and failed to demand

payment of higher premiums, the policy was not voided as to the mortgagee.

We can find no cases construing the two provisions together where the insurer has knowledge of the increased hazard. Is the notice provision a "writing added hereto" under the first provision? A persuasive argument could be made that the insurer gives up its rights under the first provision when it substitutes as a remedy for increased hazard the notification by a mortgagee and the right to demand higher premiums.

Even if the remedy in the notice provision affects only the contract with the mortgagee and leaves the first provision intact as to the mortgagor, the insurer's knowledge of the increased hazard has another effect: waiver. Illinois cases do not allow an insurance company which learns of an increased hazard or other breach of contract to remain silent and retain unearned premiums, and then to assert the breach to escape liability following a loss. *Orient Ins. Co.* v. *McKnight*, 197 Ill. 190, 64 N. E. 339 (1902); *Mechanics' Ins. Co.* v. *Hodge*, 149 Ill. 298, 37 N. E. 51 (1894); *Reinhardt* v. *Security Ins. Co.*, 312 Ill. App. 1, 38 N. E. 2d 310 (1940); *Norwich Union Indemnity Co.* v. *Haas*, 179 F. 2d 827 (7th Cir. 1950); *see also, Militzer* v. *State Farm Fire & Casualty Co.*, 412 S. W. 2d 540 (Mo. Ct. App. 1967); *Briney* v. *Tri-State Mutual Grain Dealers Fire Ins. Co.*, 254 Iowa 673, 117 N. W. 2d 889 (1962); *Wyatt* v. *State Farm Fire & Casualty Co.*, 78 Wyo. 228, 322 P. 2d 137 (1958).

The district judge should have granted plaintiff's motion for summary judgment on the issue of increased hazard.

Defendants are liable to plaintiff for the actual cash value of the seven-story building. An affidavit by the assistant to the president of Garcy Corp. states that a prospective buyer had asked for an appraisal of the building. The appraiser inspected the building on September 6, 1969. After the fire the following July, the appraiser submitted to plaintiff an appraisal valuing the building at $633,532.

Defendants did not object to the form or content of the affidavit and failed to file any affidavits contesting the amount of the appraisal. Thus the record contains no factual controversy on the actual cash value of the Building. *DeBardeleben* v. *Cummings*, 453 F. 2d 320 (5th Cir. 1972). Since the value exceeds the total coverage, plaintiff is entitled to recover the full $300,000 on the policies. The case is remanded for entry of summary judgment for plaintiff in the amount of $300,000.

REVERSED AND REMANDED.

APPENDIX B.

Cited, 7 Fire and Casualty Cases 597.

GREYHOUND BUILDING CORPORATION OF CHICAGO, *Plaintiff,*
vs.
FIDELITY-PHENIX FIRE INS. CO. OF N. Y., ET AL., *Defendants.*
} United States District Court for the Northern District of Illinois, Eastern Division.

Preliminary Contract for Demolition of Building—Measure of Damages.—The insurer contended that, since there were negotiations in progress for the demolition of the building at the time of the fire, the only measurable loss was the amount spent in the increased cost of wreckage. However, since the preliminary agreement was incomplete, plaintiff had not become legally bound to the wreckage company for the demolition of the building prior to the occurrence of the fire and the measure of damages must be applied with this fact in mind.

Lord, Bissell & Kadyk, 135 LaSalle St., Chicago, Ill., for Plaintiff. Samuel Levin, 231 S. LaSalle St., Chicago, Ill., for Defendant.

LABUY, J.: In 1941 the plaintiff became the fee owner of buildings located at 151-159 North Clark Street, known as the Ashland Block, and 151-159 North Clark Street and rear of 66-72 West Randolph Street, known as the Apollo Theatre. The defendants had issued first insurance policies to plaintiff in September 1947, insuring the buildings for a term of three years against loss by fire. On June 2, 1949 at about 1:30 or 2:00 A. M. a fire occurred in the Apollo Theatre substantially destroy-

ing it and damaging those portions of the Ashland Block used as an entry way and lobby for the theatre. The provisions of the policies provide generally as follows:

> ". . . does insure (plaintiff) and legal representatives to the extent of the actual cash value of the property at the time of loss, but not exceeding the amount which it would cost to repair or replace the property with material of like kind and quality within a reasonable time after such loss, without allowance for any increased cost of repair or reconstruction by reason of any ordinance or law regulating construction or repair * * * against all direct loss by fire * * * to the property described hereinafter."

The claim of the Apollo Theatre is for the entire amount of insurance on the building, or $112,000, and the claim of the Ashland Block is for $15,393. It is the contention of the defendants that plaintiff had not suffered any loss as a result of the fire, or that the only measurable loss is the amount of $5,000 which plaintiff was compelled to expend, being increased cost of wreckage. Pre-trial briefs have been submitted by the parties and the sole question presented for determination is the question of damage.

Considerable discussion has been devoted to applicable doctrines of insurance law; that is, that "actual cash value" is to be determined by the cost to replace the building at the time of the fire, less depreciation; or, that as a contract of indemnity, is to be determined by the value of the property to the insured at the time of the loss. In an analysis of the cases cited by the litigants, it does not appear that these two doctrines are irreconcilable. Concededly a contract of fire insurance is a contract of indemnity. The controversy herein relates solely to the measure of damages to be applied in calculating the liability of the parties. While "actual cash value" of the property at the time of loss is the measure provided by the policies herein, this figure is affected by certain depreciable elements which will affect the "actual cash value". No court has set forth any standard for

determining these depreciating elements, and indeed, it would be impractical to do so since these are variable factors dependent upon individual circumstances.

Of primary importance in the instant case, is the question of whether abandonment of use as a theatre and building by the plaintiffs had occurred at the time of the fire. The following facts will bear upon the ultimate decision.

On December 29, 1948 and January 3, 1949 the plaintiff notified Balaban & Katz, lessee of the Apollo Theatre, that plaintiff had elected to terminate the lease effective April 4, 1949 "in order that the building might be demolished".

On February 2, 1949 the plaintiff's Board of Directors authorized the demolition of the buildings, authorized its officers to enter into a contract for demolition, and authorized the erection of a bus terminal on the site.

On February 14, 1949, plaintiff directed the solicitation of bids for demolition; on February 17 bids were listed; and on February 21, 1949 specifications and instructions were sent to prospective bidders.

On March 16, 1949 it is stated plaintiff wrote The Equitable Life Insurance Company, the mortgagee for its consent to the demolition of the buildings and stated therein that preliminary work had already started on the tunnel, which would lead from Wacker Drive at street level to the south side of Lake Street, under Lake Street to the south boundary where eventually a loading terminal was to be built, and the tenants of the Ashland, Union and Apollo Theatre buildings had been notified of the termination of their leases.

Sometime in the middle of April 1949 Pielet Scrap Iron & Metal Company, the low bidder, was requested by the architectural and engineering firm to extend for 30 days its bid of $53,020 for demolition, including the sum of $3,750 for cost of completion bond. Further negotiations transpired with plaintiff wherein Pielet offered to demolish for the sum of $80,000 plus $3,750 completion bond.

On May 20, 1949 Pielet advised plaintiff that if the job was given to them within 10 days, Pielet would deposit the sum of $10,000.

On May 20, 1949 the following letter was sent to Pielet by plaintiff signed by its secretary:

> "This will confirm the telephone conversation today between David Pielet and George T. Christie, wherein the latter advised Mr. Pielet that we have accepted the proposal worked out in negotiations between our respective representatives last Tuesday in connection with the wrecking by your firm of the three buildings on our property at the northeast corner of Clark and Randolph Street, Chicago, Illinois. The proposal we have accepted being as follows:
>
> The contract price for wrecking the buildings is to be $83,750.00 and you are to furnish the performance bond and insurance provided for in the specifications which have been furnished you. Immediately upon receipt of this letter, you are to deposit with us $10,000.00 in cash as a bid bond to assure us that you will not withdraw from your commitment to perform the work for the price herein specified.
>
> At the time the contract covering the performance of the work is entered into, you are to deposit into an escrow or similar account, the sum of $50,000.00. The use of the funds so deposited to be restricted to the payment of expenses incurred by you in performing the wrecking operations and after you have taken down the Ashland Building to top of the twelfth floor, we are to deposit in this account the $10,000.00 received from you to bind your commitment. When the Ashland Building has been taken down to the top of the fifth floor, we are to deposit in the escrow account $25,000.00 of the purchase price. The balance of the purchase price amounting to $58,750.00 to be paid to you after completion of the work.
>
> The work is to be commenced as soon as possible after we have given you notice to proceed and is to be completed within five months from the date which such notice is given. Before any payments on the purchase price are

made by us, either into the escrow account or to you, we are to be entitled to receive from you appropriate evidence in the form of waivers of mechanics liens, or otherwise, that there are no unpaid obligations which could constitute a lien against the real estate upon which the wrecking operations are to (be) performed.

It is understood that this letter does not constitute the contract between us under which the work is to be performed, but is merely an outline of the more important provisions of a contract which is to be entered into as soon as practicable and which is to be in a form satisfactory to both of us and also will necessarily have to satisfy the Bonding Company and your insurance carrier.

In general the terms and conditions of the specifications insofar as they are not inconsistent with the foregoing, shall be the basis for the contract which is to be entered into between us.

If, as Mr. David Pielet has suggested you wish to proceed with the erection of a canopy around the buildings which are to be wrecked before all of the formal documents are drawn in connection with this matter and before obtaining the performance bond above mentioned, we will permit that to be done as soon as you are ready to go ahead, provided that you have obtained the necessary permit from the City and furnish us with a satisfactory insurance binder which will protect us against Public Liability, Property Damage, Workmen's Compensation and Workmen's Occupational Diseases Claims."

On May 23, 1949 Pielet delivered a cashier's check for $10,000 to Mr. Christie and also delivered the following letter addressed to the plaintiff:

"In reference to our conversation and your letter of May 20th to apply as evidence of good faith for the writing of a contract in the sum of $83,750.00 to be paid to us for the wrecking of three buildings on your property at the northwest corner of Clark and Randolph.

This contract is to be written in terms acceptable to the bonding company and our attorney, Andrew W. Gatenby. The check is to be returned to us in the event the contract

is not entered into within 10 days. The contract to be substantially as outlined in your letter of May 20th with changes and corrections.

This check and balance to be held until final payment and to be returned to us when job is completed and satisfactory to owner."

Sometime in May Balaban and Katz removed all of its fixtures and surrendered the keys to the manager. All of the seats in the theatre were removed and sold by the plaintiff.

On May 24, 1949 plaintiff wrote the building commissioner advising that plaintiff had made arrangements with Pielet for wrecking the buildings in question and authorized the building commissioner to issue to the Pielet Company the necessary wrecking permit.

All the tenants with the exception of two had vacated the building before June 2, the day of the fire.

On June 3, the day following the fire, a permit was granted to Pielet to use certain footage on Clark and Randolph Streets.

On June 13 plaintiff and Pielet entered into a formal contract which provided $5,000 more for demolition due to increased work in wrecking caused by the fire.

On June 20, plaintiff relinquished possession to Pielet and permits to demolish were issued June 30th and July 22, 1949.

If plaintiff has entered into a binding contract for the demolition of the buildings between the dates of May 20th and June 2, then it must be deemed to have abandoned further use of the premises as a theatre and building. The defendants assert that the intention of the plaintiff to demolish ripened into action long prior to the fire and that all essential elements of an agreement for wrecking, demolition and removal of the buildings had been entered into by the plaintiff and Pielet on May 20, 1949 thirteen days prior to the fire. Plaintiff asserts the communications of May 20, and May 23 do not constitute a contract and are only evidences of an intent to make a contract.

If plaintiff was legally bound to proceed with the demolition of the buildings before the date of the fire, the use of these buildings as buildings had terminated and the cost of reproduction thereof cannot be considered in the question of damages. *Board of Education Hancock County* v. *Hartford Fire Ins.* (W. Va., 1942), [4 CCH Fire and Casualty Cases 152] 19 S. E. 2d 448.

The general rule of contracts is that where a request for a bid is made and an acceptance of the bid in accordance with the terms of the proposals is made, a contract relationship is established. *Garfielde* v. *U. S.*, 93 U. S. 242; *Gjellefold* v. *Drainage District* (Iowa), 212 N. W. 691. If nothing further had been done the mere acceptance of the proposal would suffice to bind the parties. But the purported acceptance of May 20th went further. It requested an immediate deposit of $10,000 by Pielet to show its good faith for performance; it set forth what were previous oral discussions of certain terms which were to be included in a written contract; it specifically stated "that this letter does not constitute a contract between us under which the work is to be performed, but is merely an outline of the more important provisions of a contract which is to be entered into as soon as practicable and which is to be in a form satisfactory to both of us and also will necessarily have to satisfy the bonding company and your insurance carrier."

This letter setting forth what the plaintiff believed to be the elements of their prior negotiations could be an acceptance only if the evidence would sustain such an agreement between the parties. See Restatement of Contracts, Section 26, page 33:

> "Parties who plan to make a final written instrument as the expression of their contract, necessarily discuss the proposed terms of the contract before they enter into it and often, before the final writing is made, agree upon all the terms which they plan to incorporate therein. This they may do orally or by exchange of several writings. It is possible thus to make a contract to execute subsequently a final writing which shall contain certain provisions. If parties have definitely agreed that they will do so, and that the

> final writing shall contain these provisions and no others, they have then fulfilled all the requisities for the formation of a contract. On the other hand, if the preliminary agreement is incomplete, it being apparent that the determination of certain details is deferred until the writing is made out; or if an intention is manifested in any way that legal obligations between the parties shall be deferred until a writing is made, the preliminary negotiations and agreements do not constitute a contract."

In the reply to this letter, Pielet states that it "does not cover all matters discussed with us" and that although substantially correct "changes and corrections" were contemplated. Further, to the requirement that an immediate deposit be made of $10,000, Pielet attached a condition making such deposit subject to the writing of a contract within ten days and that said contract be acceptable to its attorney. The rule is that unless all the terms and conditions are agreed upon and nothing is left to future negotiations, an agreement to make a written contract is binding. Generally speaking the circumstances that the parties did intend a subsequent agreement to be made is strong evidence that they did not intend the previous negotiations to amount to an agreement, and is to be considered as a circumstance bearing upon the ultimate determination.

From the letters here exchanged it appears the final writing was to contain other provisions than those discussed. The preliminary agreement is therefore incomplete, it being apparent that certain details were to be deferred until the writing was made out. Any legal obligation to be bound was conditioned upon the acceptability of the contract to certain third persons. Where an agreement is made subject to the consent of a third party, it must be looked on as a conditional agreement, dependent on such consent being given, in default of which the agreement must be taken not to have become effective. 17 C. J. S. Sec. 456-496, 500. Such is the situation from the disclosure of the facts in the instant case.

No evidence or testimony has been heard by the court. The litigants have specially requested the court to make a determination of this question from facts agreed upon. From these submitted facts the court is of the opinion that plaintiff had not become legally bound to Pielet for the demolition of the buildings prior to the occurrence of the fire. Consequently, the measure of damages must be applied with this fact in mind.

APPENDIX C.

UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division.

CHICAGO TITLE & TRUST COMPANY,
Trustee under Trust No. 49944,
Plaintiff,

vs.

UNITED STATES FIDELITY AND GUARANTY COMPANY,
Defendant.

72 C 3225

MEMORANDUM OPINION.

This is an action on an insurance contract which provided coverage for property damage caused by fire. The parties are of diverse States and the amount in controversy exceeds $10,000. An answer having been filed, plaintiff has filed two motions—1) a motion in limine seeking an order precluding the defendant from introducing any evidence of the purchase price or market value of the building covered by the defendant's policy of fire insurance and damaged by fire on May 1, 1972, and 2) a motion to strike both the defendant's affirmative defense number 3 in which it is alleged that the building was abandoned and left vacant and unoccupied for a period in excess of sixty days, in violation of the provisions of the policy thereby rendering it void, and defendant's affirmative defense number 4, in which it is alleged that the plaintiff and its beneficiary increased the hazard to the insured property through its management thereof, having permitted it to exist in such

condition of disrepair and uninhabitability as to constitute an increase of hazard, in violation of the provisions of the policy of insurance, and that the plaintiff caused and permitted the building to fall into such a state of disrepair as to violate the various Building Codes of the City of Chicago, constituting an increase of hazard, in violation of the provisions of the policy of insurance. For the reasons stated below, these two motions will be denied.

On May 1, 1972, and for a period prior to that date, the plaintiff, as trustee, held title to a building located at 1312-1316 West 79th Street, Chicago, Illinois. A policy of insurance including coverage for damage and loss by fire was issued on the subject building by the defendant under the direction of the Illinois Property Insurance Placement Facility, commonly known as the Illinois FAIR Plan. This program was created pursuant to Federal and State statutes to provide insurance in "high risk" areas, and the defendant issued the instant policy as a subordinate insurer at the direction of the FAIR Plan.

On February 6, 1972, the subject building sustained damage as a result of fire, and the defendant under the instant policy paid out approximately $18,000 to the insured at that time. Subsequently, on April 7, 1972, Oddie Banks apparently purchased the beneficial interest in the property and became the beneficiary of Chicago Title & Trust Company Trust No. 49944. The next day she made out an Application for Property Insurance Placement to the Illinois FAIR Plan, on the form normally utilized for an initial application for insurance. The statute pursuant to which the insurance had originally been issued speaks only to initial applications and makes no mention of notice of change of beneficiary on previously insured property. Whether or not an assignment of a FAIR plan policy is proper or possible is obviously an issue in this case.

The fire which gave rise to the instant claim and suit took place 23 days later, on May 1, 1972. Sometime thereafter, the building was demolished.

On May 8, 1972, FAIR ordered an inspection of the property ostensibly pursuant to the April 8, 1972 application for insurance. This inspection actually took place on August 16, 1972.

It is noteworthy that at the time of the fire on May 1, 1972, there was pending in the Circuit Court of Cook County a complaint brought by the City of Chicago against the plaintiff demanding that numerous Building Code violations in the building be corrected. On April 6, 1972, the day before Oddie Banks became the beneficiary under the trust, Judge David Cerda had ordered that the building be vacated and that no heat repairs be made on it. On April 17, 1972, two weeks before the fire, Judge Irwin Cohen ordered that the building be boarded and secured.

In its complaint, plaintiff seeks damages of $43,795 which it alleges is the actual cash value of the subject building as insured by the defendant, which damages it alleges were caused by the fire of May 1, 1972.

I.

The plaintiff's motion to preclude the defendant from introducing any evidence of the purchase price or the fair market value of the subject building obviously anticipates the position which the plaintiff assumes defendant will take with respect to damages if the issue of liability under the policy is resolved against it. Assuming separate trials of the issues of liability and damages such a motion may be ultimately unnecessary. However, given the fact that a trial on the issue of damages, if the issue of liability is resolved favorably to the plaintiff, will follow immediately after resolution of the question of liability and the fact that a ruling on the motion may facilitate a disposition of the case without a trial, we will proceed to a ruling at this time.

The issue presented by this motion is whether, under Illinois law, the facts of this case permit any evidence other than repro-

duction cost minus depreciation to be presented to the fact finder to determine "actual cash value" which is the amount owing plaintiff under the policy. The principal statement of Illinois law, which, as a federal court sitting in a diversity action, we are bound to apply, was made in *Smith* v. *Allemannia Fire Ins. Co.*, 219 Ill. App. 506 (3rd Dist. 1920). The Illinois Appellate Court there held that actual cash value of a building as defined in a fire insurance contract means the cost of reproducing that building minus its depreciation. Market value was found irrelevant to the determination of actual cash value. Despite the fact that there has been no Illinois Supreme Court decision on this point and despite the fact that there may be some factual misapprehensions in the opinion, *Smith* has been consistently followed on numerous occasions as the law in Illinois. *See, e.g., Esquire Restaurant, Inc.* v. *Commonwealth Ins. Co. of New York*, 393 F. 2d 111 (7th Cir. 1968); *Wisconsin Screw Co.* v. *Fireman's Fund Ins. Co.*, 297 F. 2d 697 (7th Cir. 1962); *Knuppel* v. *American Ins. Co.*, 269 F. 2d 163 (7th Cir. 1959).

One exception to the general rule of *Smith* was recently articulated by Judge Marovitz of this Court. In *Aetna State Bank* v. *Maryland Casualty Co.*, 345 F. Supp. 903, 909 (N. D. Ill. 1972), he held that "actual cash value" is not the proper criterion for determining the amount of loss for property which is in the process of being demolished and whose demolition at the time of the loss is no longer a matter of conjecture or speculation. He further held that, although the insurance policies were in effect at the time of the loss, the mortgagee having met its obligations, there was nevertheless no compensable loss in view of the fact that there is no value to buildings in the process of demolition. Summary judgment was granted for the defendant in that case.

The facts in *Aetna State Bank* are somewhat different from those in the instant case in that the subject building there was actually in the process of being demolished whereas here the subject building was not being demolished but was standing

vacant and unoccupied, secured and boarded up under court orders requiring that it be vacated and boarded up and that its heating system not be repaired. We find this difference to be without distinction for the underlying theory behind the *Aetna* holding is that it is inequitable to award substantial monetary damages to a person to compensate him for what is of no current or present monetary value.

In the instant case, when the subject building was destroyed on May 1, 1972, it was an economically useless building. It was empty, secured and boarded. It had been gutted by a previous fire. It was not being used in any way.

Here, as in *Aetna State Bank*, it would be ludicrous to allow the plaintiff to recover a substantial amount of money representing the replacement cost less depreciation of a building that was for all practical purposes non-existent. It would be grossly inequitable for plaintiff's beneficiary to recover $43,000 for a building which less than one month prior to its destruction she had purchased for $4,000 in what appears to have been an arm's length transaction and in which building she had made absolutely no additional investment or improvements.

We hold that the *Smith* doctrine of rigidly defining actual cash value of a building as its reproduction costs minus depreciation is limited in application to those buildings which are being economically utilized at the time of their damage or destruction. (Such a limitation may be implied from the facts of those cases which have purported to follow *Smith*.) Despite the language in the various opinions, Illinois has not allowed such windfalls as plaintiff here seeks.

Illustrative of this is the recent case of *Lieberman* v. *Hartford Ins. Co.*, 6 Ill. App. 3d 948, 287 N. E. 2d 38 (1st Dist. 1972), in which the Appellate Court of Illinois went a step further than Judge Marovitz in *Aetna State Bank* and held that, where a *contract for demolition* exists on the subject building, the plaintiff has *no* "insurable interest" in the building since there is no

economic value to the building. Judgment was entered for the defendant in that case despite clear liability under the policy.

In the instant case, the building was economically useless at the time of the fire. While we would prefer a more flexible standard of insurable "actual cash value" than the Illinois courts have adopted so that, in cases like the instant one, an insurable interest having some relationship to the actual value, even though nominal, could be found, we conclude that under all the precedents, there was no insurable interest in the building at the time of the fire on May 1, 1972.

In cases such as the instant one, where the building is vacant, boarded up and under a court order prohibiting repair of its heating system, and, therefore, cannot be economically utilized, reproduction cost new less depreciation has little or no relationship to actual value. Other factors, such as market value or salvage value, should be considered in establishing any insurable interest of the building owner. In their present posture, however, the Illinois cases preclude consideration of such factors. They do, however, permit a finding that where, as here, a building is economically useless and was obviously purchased for its scrap or salvage value, there is no insurable interest. This is such a case.

II.

The fire insurance policy pursuant to which the plaintiff seeks recovery contains a standard vacancy provision which provides:

> *Conditions suspending or restricting insurance.* Unless otherwise provided in writing added hereto this Company shall not be liable for loss occurring: . . . .
>
> (b) while a described building, whether intended for occupancy by owner or tenant, is vacant or unoccupied beyond a period of sixty consecutive days.

Plaintiff has moved to strike the defendant's affirmative defense which alleges that the subject building was vacant for 60 days

in addition to moving to strike a similar affirmative defense which alleges that the plaintiff, in violation of Municipal Building Codes, allowed the subject building to fall into such a state of disrepair as to constitute an increase in hazard in violation of the terms of the policy. Each of these defenses would exculpate defendant from liability under the policy.

Plaintiff's argument in support of its motion to strike is that the defendant is "precluded" from asserting these defenses since it had ample opportunity to determine whether to continue the risk or cancel the policy after Oddie Banks made an application for insurance to the FAIR program on April 8, 1972, three weeks before the fire. Plaintiff contends that, pursuant to the statute providing for application for insurance under the FAIR plan, an applicant such as Banks is entitled to an inspection of the named property and that failure of the insurer to inspect acts as a type of estoppel upon the insurer preventing it from asserting any defenses which it could have discovered upon inspection.

Plaintiff's reliance upon this statute is misplaced. The portion relied upon, Ill. Rev. Stat. ch. 73 § 1065.71(1), provides:

> Any person having an insurable interest in real or tangible personal property at a fixed location in an urban area who, after diligent effort has been unable to obtain basic property insurance is entitled upon application to the Facility [Illinois Industry Placement Facility, i.e., the FAIR plan] to an inspection of the property by representatives of the Inspection Bureau.

After such an inspection, a policy will issue if the property is found acceptable. By its own terms, the procedure envisages an initial application for insurance only by an applicant who has been unable to obtain insurance elsewhere.

In the instant case, the plaintiff was insured by the defendant pursuant to a previous application made to *FAIR*. The only relevant information on the application of April 8, 1972, was that Banks had replaced Klaus Johnke as beneficiary under the insured plaintiff trust. As alluded to above, the statute does not

provide for notice of change of beneficiary under an insured trust. Whether or not such a change in beneficiary invalidates the insurance contract or requires a new application, is not clear. Given the unique character of the FAIR plan, it is at least arguable that a change in beneficial ownership cancels the policy and the new owner is required to seek regular insurance before applying to FAIR. Certainly the prior history of claims of the new owner is a factor which is relevant even under FAIR. Whether or not any policy of insurance was in effect on the date of the fire, May 1, is obviously, therefore, one of the issues in the case.

In any event, we cannot hold that the defendant of FAIR, which is not a party to this lawsuit, was under a statutory duty to inspect the subject building within three weeks upon application for insurance upon a building which may have been already insured, particularly when the application appeared to be for new insurance but did not indicate that the condition precedent of diligent effort to obtain regular insurance without success had been met. Given the confused and uncertain status of the old policy and the new application, we cannot prohibit the defendant from asserting what may be a valid defense.

Plaintiff further argues that defendant is precluded from asserting the vacancy defense by virtue of *Kolivera* v. *Hartford Ins. Co.*, 8 Ill. App. 3d 356, 290 N. E. 2d 356 (1st Dist. 1972). This reliance, however, is misplaced. In that case, the plaintiff had nine policies of fire insurance. The subject building had been left vacant for a period in excess of 60 days in violation of the standard vacancy provision which existed in each policy. The Circuit Court granted judgment for all the defendants on the basis of the vacancy clause. The Appellate Court affirmed this decision with respect to the six companies which had issued a policy before the 60 day period had begun, but with respect to those three companies which had issued policies within the 60 day period, it reversed and remanded to the Circuit Court. In support of this reversal, the Court stated that the companies

which had issued the policies within the 60 day period had an opportunity to inspect the premises prior to issuing the policies and held that, since they failed to exercise this opportunity to inspect, the pre-existing vacancy would be disregarded unless the policy specifically provided otherwise.

Clearly the instant case could not fall within the scope of *Kolivera* or its rationale unless we were ultimately to find that the application made by Banks on April 8, 1972 was a new application for insurance. Since that question and its implications are at present unresolved, plaintiff's motion to strike these defenses must be denied.

An appropriate order will enter denying plaintiff's motion in limine to preclude the defendant from introducing any evidence as to the purchase price or market value of the subject building and denying plaintiff's motion to strike certain defenses.

/s/ (Illegible)
United States District Judge.

Dated: June 7, 1973.

APPENDIX D.

GARCY CORPORATION,

Plaintiff,

vs.

The HOME INSURANCE COMPANY et al.,

Defendants.

No. 71 C 1573.

UNITED STATES DISTRICT COURT

N. D. Illinois, E. D.

Jan. 26, 1973.

MEMORANDUM AND ORDER

PERRY, *District Judge.*

This cause comes on upon the cross motions of plaintiff and defendants for summary judgment. The parties have filed briefs and affidavits in support of their respective positions.

This is an action by an owner (GARCY) of a complex of buildings against six insurance companies each of whom issued an insurance policy in the amount of $50,000.00. The policies in question covered the loss of the buildings by fire.

On July 6, 1970 a fire occurred at the insured location resulting in the complete loss of the buildings. Garcy is claiming the full amount of the policies, $300,000.00, in this suit. It is a series of events which ocurred prior to the fire which give rise to the issues of this case.

On May 5, 1970 Garcy and a wrecking company, 3 Oaks Wrecking and Lumber Co., entered into a contract that the

complex of the buildings was to be demolished and the land leveled. The contract provided that all salvage from the wrecked buildings would belong to the wrecking company.

By a letter dated June 25, 1970 an agent of the plaintiff notified the plaintiff's insurance broker of the commencement of the demolition and the plaintiff's desire to cancel the fire insurance effective immediately. The defendants claim that this letter was directed not only to the plaintiff's broker but also to the defendants' agent. At any rate prior to the actual delivery of the insurance policies the plaintiff, on the advice of counsel, attempted to revoke this notice of cancellation and instructed his broker to take no steps to effectuate the cancellation.

On July 6, 1970 while the wrecking operation was going on in the building complex, a fire broke out which completely destroyed the complex including the largest building thereon, a seven story building. It is contended by the plaintiff and not denied by the defendant, that the wrecking operations on this building had not commenced. Although the complaint is phrased in terms which would seem to encompass a claim for damage to the entire complex, plaintiff has in the present motions for summary judgment limited its claim to damage to the seven story building.

The defendants raise three points in their argument for summary judgment, any one of which they claim, should impel the entry of a summary judgment in their favor. Concisely the defendants' arguments are (1) the policies were cancelled by the plaintiff prior to the fire; (2) the wrecking contract and the work done thereunder constituted an increased hazard which suspended the policies; (3) after the commencement of the wrecking operation none of the buildings had any value to the insured and the insured no longer possessed any insurable interest therein. Each of these arguments will be considered separately.

CANCELLATION

[1] The defendants support their position on this issue with a letter dated June 25, 1970 from Larry Kurtzon of Garcy Corporation addressed as follows:

> Mr. E. K. Eichengreen
> Rollins Burdick Hunter Co.
> 231 South LaSalle Street
> Chicago, Illinois 60604

The defendants contend that the letter constituted not only notice to the plaintiff's agent, Mr. Eichengreen, but also to the defendants' agent, Rollins Burdick Hunter Co. Aside from the letter itself the only evidence that the defendants offer that the defendants' agent was notified is a statement in an affidavit by Dorothy McNeill, Mr. Eichengreen's secretary that "Mr. E. K. Eichengreen and Rollins Burdick Hunter Co. were notified by a letter dated June 25, 1970". The plaintiff does not dispute the defendants' authorities which hold that a request for cancellation communicated by an insured to an insurer is fully effective absent delivery of the policies and that such cancellation cannot be unilaterally revoked by the insured prior to the delivery of the policies. De La Perriere v. American Home Assurance Ins. Co., 106 Ga. App. 516, 127 S. E. 2d 478 (1962); Waller v. Door County Mut. Ins. Co., 256 Wis. 323, 41 N. W. 2d 211 (1950). The plaintiff relies on cases which hold that a cancellation of insurance is not effective until notice is actually received by the insurer or its agent. Ross Togs Inc. v. Fidelity-Phenix Ins. Co., 36 A. D. 2d 706, 319 N. Y. S. 2d 1 (1971); Louisiana Public Utilities Co. v. Atlas Assurance Co., 238 App. Div. 474, 264 N. Y. S. 603 (1933). The plaintiff contends that the letter of Mr. Kurtzon was directed to the plaintiff's agent and did not have the effect of notifying the defendants' agent.

[2] This court is of the opinion that the defendants' motion for summary judgment on the issue of cancellation should be

denied for a number of reasons. *First* the defendants do not contend and offer no affidavits to show that any agent of the insurers was ever notified of the contents of the Kurtzon letter prior to the date of the fire or took any steps to effectuate the cancellation of the policies. Mrs. McNeill's affidavit which is relied on by the defendants appears to be no more than a conclusion drawn from the manner in which the letter was addressed. The plaintiff on the other hand has submitted affidavits by Mrs. McNeill and Mr. Eichengreen that state that they never forwarded a copy of the letter to the insurers prior to the fire. The defendants are therefore relying solely on the form of the letter to support their position on this issue without any affirmative evidence that the letter or its contents were made known to the defendants prior to the fire. This is obviously insufficient evidence on which to base a summary judgment. *Second* the form of the letter itself, so heavily relied upon by the defendants, does not appear to be an attempt to notify the agent of the defendants. The agent of the plaintiff maintained an office in a group of offices leased by the agent of the defendants. The fact that the heading of the letter contained the words "Rollins Burdick Hunter Co." on the second line was probably a convenient way of addressing a letter just as in other circumstances one might insert a room number in an address. It is not contended that Mr. Eichengreen was an agent of the defendants, therefore a letter directed to and received by him can in no way be held to be notice to the defendants' agent. The salutation of the letter reads "Dear Ed" and makes no reference to the defendants' agent. The letter asks for a quotation on another insurance policy which is the type of inquiry which would be made to a broker and not directly to the defendants' agent. Finally the letter asks that the cancellation be "taken care of", as if it is left to the broker to handle the actual mechanics of cancellation. *Third* the defendants have admitted in their answer that the policies were in full force and effect at the time of the fire and further admit in their reply memorandum to this motion that

they did not have the benefit of the Kurtzon letter at the time of the filing of the answer. It is apparent to this court that the defendants have not made an adequate showing of notice of cancellation. This however does not dispose of the other grounds raised by the defendants.

INCREASED HAZARD

[3] The defendants next claim is that the execution of the wrecking contract was an increase in hazard which suspended the policies. The defendants have admitted in this proceeding that their agent was notified of the commencement of the wrecking. This notification was stipulated to by the defendants in another proceeding before Judge Marovitz involving the same fact situation. Aetna State Bank v. Maryland Casualty Company, D. C., 345 F. Supp. 903 (1972). Now the defendants would have this Court find that the execution of the wrecking contract and the commencement of the wrecking had the effect of automatically suspending coverage of the policies. This defense was sufficiently disposed of in Judge Marovitz's opinion in which he said: "We therefore find that the mortgagor's notification of the greater risk was sufficient to prevent automatic nullification both as to the mortgagor *and* the mortgagee."

This court adopts Judge Marovitz's holding and denies the defendants' motion for summary judgment as to the issue of increased hazard.

LACK OF VALUE AND INSURABLE INTEREST

The defendants final claim is that the building had no value to the plaintiff at the time of the fire and that consequently the plaintiff lacked an insurable interest therein. Judge Marovitz held in the *Aetna* case that the buildings had no value to the plaintiff and that therefore no loss could be shown. In a similar case involving demolition, decided subsequent to the opinion in

Aetna, the Illinois Appellate Court held that an owner bound by contract for the destruction of a building upon which demolition had commenced no longer held an insurable interest therein. Lieberman v. Hartford Fire Insurance Company, 6 Ill. App. 3d 948, 287 N. E. 2d 38 (1972).

The plaintiff argues that the Illinois law requires that the court determine the value of the building for purposes of this suit by simply determining the replacement cost less depreciation and without taking into account such collateral factors as the execution of the wrecking contract and the commencement of the wrecking operation. The plaintiff relies on the case of Knuppel v. American Insurance Co., 269 F. 2d 163 (7th Cir. 1959). In this case there was conflicting testimony as to whether the owner of the building destroyed by fire intended to have the building demolished. There was no evidence that any of the affirmative steps such as execution of a wrecking contract and commencement of the wrecking operation had been taken. To equate an intent to commence wrecking in the future with the actual commencement of wrecking would be to ignore the realities of the situation.

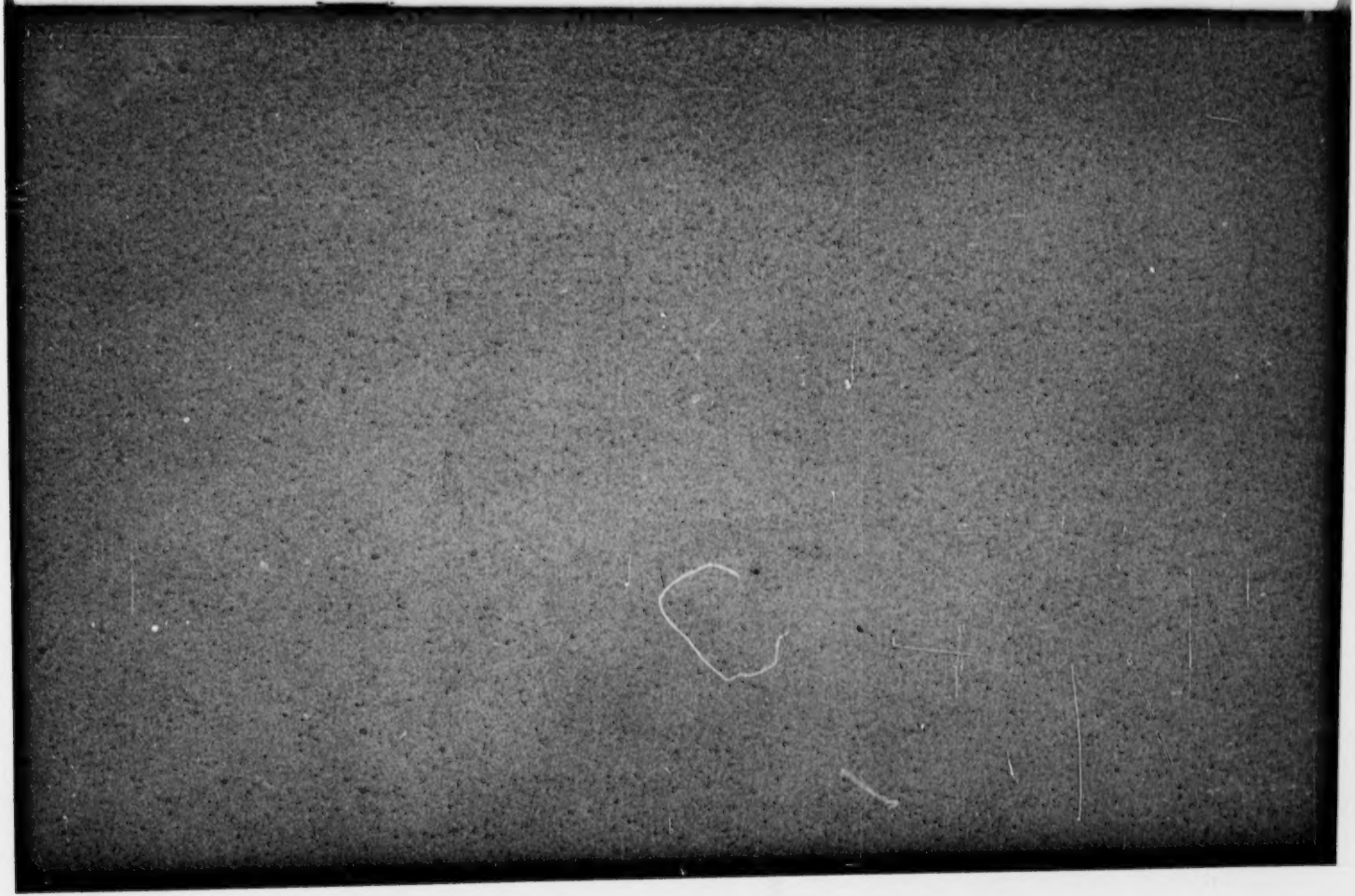
[4, 5] The plaintiff's other authorities are similarly defective and have been sufficiently covered in Judge Marovitz's opinion. The holding in this case is clearly not a rejection of the Illinois "actual cash value" rule, but simply a recognition that this rule is essentially a method of valuation and is not controlling under the facts and circumstance of this case which establish that the property had become valueless to the owner and had been abandoned to the wrecker.

The holding of Lieberman v. Hartford Fire Insurance Company although phrased in terms of insurable interest is in essence indistinguishable from Judge Marovitz's holding. The court there held that a property owner having entered into a binding contract with a wrecking company which had commenced operation no longer had an insurable interest in the

property because he could show no economic disadvantage by its destruction.

The plaintiff attempts to distinguish the holdings in *Aetna* and *Lieberman* by stating that actual wrecking operations had not commenced on the particular building upon which this suit is claimed to have been brought. It is conceded that the wrecker had commenced operation on the complex of buildings and that the building concerned would be wrecked during the course of this operation. The court is not convinced by this argument. As Judge Marovitz stated in *Aetna:* "To allow almost a quarter of a million dollars to be paid for buildings that were valueless and whose duration of existence was governed solely by the rapidity of the swing of the wrecker's ball . . . would indeed produce a grossly inequitable result."

For the reasons above stated summary judgment is granted to the defendant on the issue of the amount of the loss. The plaintiff's motion for summary judgment is denied.



Supreme Court, U. S.
FILED
AUG 1 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974.

No. 73-1974

GARCY CORPORATION,
Plaintiff-Respondent,

vs.

THE HOME INSURANCE COMPANY, CENTENNIAL INSURANCE COMPANY, RELIANCE INSURANCE COMPANY, GREAT AMERICAN INSURANCE COMPANY, ROYAL INSURANCE COMPANY, LIMITED AND MARYLAND CASUALTY COMPANY,
Defendants-Petitioners.

PETITION FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH JUDICIAL CIRCUIT.

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974.

No. 73-1974

GARCY CORPORATION,

Plaintiff-Respondent,

vs.

THE HOME INSURANCE COMPANY, CENTENNIAL INSURANCE COMPANY, RELIANCE INSURANCE COMPANY, GREAT AMERICAN INSURANCE COMPANY, ROYAL INSURANCE COMPANY, LIMITED AND MARYLAND CASUALTY COMPANY,

Defendants-Petitioners.

PETITION FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH JUDICIAL CIRCUIT.

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

STATEMENT OF THE CASE.

Because the defendants' statement of facts includes many assertions which are either immaterial to the issues specified in the petition or unjustified by the record, it is necessary for plaintiff to supplement the statement of facts. For simplicity, plaintiff adopts (for purpose of its opposition to the granting of

the petition herein) the following statement of facts contained in the opinion of the Court of Appeals, which adequately states the facts material to defendants' issues:

> "Plaintiff owned five buildings in the same block: a seven-story building, a four-story building, a two-story building, a one-story and a quonset hut. (Kurtzon Aff. (19), pars. 2, 8.)* In April, 1970, each of the six defendant insurance companies issued identical policies totaling $300,000 against fire damage to any or all of the five buildings. (Policy, Ex. A to Compl. (2).)
>
> In May or June of 1970, plaintiff entered into a contract with a wrecking company for the demolition of all the buildings. (Kurtzon Aff. (19), par. 10.) All salvage would become property of the demolition company. The wreckers began work during the last week of June; it was estimated the demolition would take 90 days. (Kurtzon Aff. (19), par. 11.) On July 6, 1970, the company had demolished the quonset hut, the one-story building, part of the two-story building and a small part of the four-story building. (Riccio Aff. (19), par. 3; Kurtzon Aff. (19), par. 13.)
>
> No wrecking or stripping of salvageable material had begun on the seven-story building. (Riccio Aff. (19), pars. 3, 4; Kurtzon Aff. (19), par. 14.) It contained $26,000 of inventory and various machinery and equipment. (Kurtzon Aff. (19), par. 14.) An affidavit of the assistant to the president of plaintiff corporation stated that plaintiff was trying to sell the seven-story building, even while the smaller buildings were being wrecked. (Kurtzon Aff. (19), par. 16.) The building was listed with real estate brokers. (Kurtzon Aff. (19), par. 16.) If plaintiff had found a buyer, it would have halted the demolition. (Kurtzon Aff. (19), par. 16.)
>
> On the evening of July 6, 1970, all the remaining buildings were destroyed by fire. (Kurtzon Aff. (19), par. 17.) An appraisal submitted by plaintiff placed the actual cash

* Record references have been inserted by plaintiff for the convenience of the Court. Numbers in parentheses refer to document number in Record on Appeal.

value of the seven-story building before the fire at $633,532. (Appraisal, Ex. B to Kurtzon Aff. (19); Kurtzon Aff. (19), par. 18.) Defendants refused to pay plaintiff's claim for the total amount of coverage, $300,000. (Compl. (2), pars. 13, 14; Ans. (9), pars. 13, 14.)

The case was submitted to the district court on motions for summary judgment from both sides. Although the complaint alleges a claim based on loss of all the buildings, plaintiff's motion for summary judgment relies on loss of the seven-story building alone. Defendants' motion seeks judgment on the damages issue on the theory that the seven-story building had no value to plaintiff at the time of the fire because of the contract for demolition."

The District Court denied defendants' motion as to its separate defenses (which defenses, involving cancellation and increase in hazard, are not at issue here) but granted defendants' motion as to the damages issue; it denied plaintiff's motion. The Court of Appeals reversed the lower court, remanding the case for entry of summary judgment for plaintiff in the amount of $300,000.00.

Defendants thereafter filed a Petition for Rehearing *In Banc*, which was denied, and have now filed the present Petition for Writ of Certiorari.

INTRODUCTION AND SUMMARY

Defendants seek to bring to this Court an Illinois insurance law issue concerning the effect, under Illinois law, of the execution of a demolition contract on the insurable interest of an insured in an Illinois building.

In its opinion filed herein, the Court of Appeals for the Seventh Circuit determined that, under Illinois law, the insured retained its right to recover under the policy until "the insured had abandoned the building pursuant to an irrevocable commitment to demolish it." Under this rule, plaintiff was clearly entitled to judgment on the record and this was the decision of the Court of Appeals.

Defendants' quarrel with this decision is based on their belief that the Court of Appeals erred in its determination of Illinois law; defendants believe that Illinois law provides that the mere execution of a demolition contract between the owner and a demolition contractor terminates insurable interest.

There is no claim of any kind by defendants of any conflict between the courts of appeal for the various circuits nor is there any claim that there is any constitutional issue in this case if it is conceded that the Court of Appeals was correct in its determination of Illinois law. There is nothing in the petition which suggests that this particular Illinois insurance issue has the importance contemplated by Rule 19 of the Rules of the Supreme Court.

The three specific issues submitted by defendants on pages 3 and 4 of defendants' petition are as follows:

> A. "Whether this Court's 1940 decision in *West* v. *American Telephone & Telegraph Co.* . . . remains a viable and enforceable guideline in diversity cases. . . .
>
> B. Whether the Court of Appeals' [alleged] refusal to apply Illinois law constituted a violation of the Tenth

Amendment to the United States Constitution and further . . . was an unjust discrimination . . . in contravention of the constitutional safeguards of the Fifth Amendment. . . .

C. Whether . . . the Court of Appeals should have . . . [applied] the doctrine of abstention."

None of these specified issues can be a proper basis for granting a Writ of Certiorari in the present case.

There is nothing in this case which in any way questions the viability of this Court's decision in *West*. There can be no constitutional issue in the defendants' disappointment in the Court of Appeals' decision as to the content of the question of Illinois law presented to that Court nor in defendants' being compelled to honor their contract with plaintiff. And the similarity of defendants' position with that of most other disappointed litigants is so great that if abstention is obligatory here, the natural consequence would be either a virtual obliteration of diversity jurisdiction or substantial chaos while new criteria governing abstention are developed.

Defendants' abstention request has been made too late to be considered. The request (which defendants admit is an extension of abstention doctrine) was made for the first time in their Petition for Writ of Certiorari. To merit serious consideration such a request should, in any event, have been made to at least one of the lower courts. Here defendants' desire to invoke abstention (if, indeed, defendants had such a desire prior to losing in the Court of Appeals) was not even mentioned in any motion or brief in either the District Court or the Court of Appeals or even in defendants' Petition for Rehearing in the Court of Appeals.

If a losing party in a diversity case can, after the last petition for rehearing in the Court of Appeals is denied, still find a way to cause the whole lawsuit to be tried again in a new court, the cost in delay and injustice to the parties can indeed by unbearable. But the cost to the judicial system of such tactics is also substantial and we are surprised that defendants could make

such a belated request, especially when, at page 20 of their petition, they acknowledge that, even without these tactics, the courts are overworked and that particular courts are constantly in danger of being deflected from their primary institutional functions.

Granting defendants' petition would aggravate the problems they describe. If defendants have their way, either the Supreme Court will undertake the detailed redetermination of Illinois insurance law in this case or the parties, after having fully litigated this case commencing in 1971 through the Court of Appeals, will be sent back to the state courts and directed to start again from scratch, adding more than three more years to the litigation. Requiring parties to litigate completely the same case twice in two different court systems over a period of nearly seven years is surely not a way to dispense justice or to avoid overburdening our courts.

Defendants' own arguments present compelling reasons for the prompt rejection of the petition filed herein.

ARGUMENT

I.

THE DECISION BY THE COURT OF APPEALS HEREIN FULLY COMPLIES WITH WEST v. AMERICAN TELEPHONE & TELEGRAPH CO.

In pressing for review, defendants rely almost entirely on the decision of this Court in *West* v. *American Telephone & Telegraph Co.*, 311 U.S. 223, 85 L. ed. 139, 61 S. Ct. 179 (1940). There this Court held it was incorrect for the Court of Appeals to reject state law as promulgated by a state intermediate appellate court and substitute its own rule because it deemed that rule superior.

It cannot be reasonably argued that the principles of *West* have in any way been affronted by the proceedings in the present case.

A. THE ACTION BY THE COURT OF APPEALS IN THE PRESENT CASE WAS DRAMATICALLY DIFFERENT FROM THE ACTION PROSCRIBED IN WEST.

West involved a clear rejection of state law by the Court of Appeals (the "Ohio Federal Court") in that case. The Ohio Federal Court had before it the same parties and same cause of action as had been previously before an Ohio intermediate appellate court (the "State Court"). In such prior proceeding, the State Court had held a prior demand in a conversion action to be a necessary element of the cause of action. The Ohio Federal Court held this was incorrect and asserted its right to adopt its own rule because the question had not been decided by the Ohio Supreme Court. Because the facts and the parties were the same, there was no basis for distinguishing the prior state proceeding and there were no other Ohio state court decisions material to the issue.

This Court said such action by the Ohio Federal Court in *West* was incorrect because it was the duty of the federal courts "to ascertain from all the available data what the state law is and apply it. . . ." (311 U.S. at p. 237), and that an intermediate state appellate court decision "is a datum for ascertaining state law which is not to be disregarded by a federal court unless it is convinced by other persuasive data that the highest court of the state would decide otherwise." (311 U.S. at p. 237).

Virtually the entire argument of defendants is based on their claim that the rejection in this case by the Court of Appeals of defendants' *interpretation* of the effect on Illinois insurance law of *Lieberman* v. *Hartford Fire Insurance Co.*, 6 Ill. App. 3d 948, 287 N.E. 2d 38 (1st Dist. 1972) was similar to the action of the Ohio Federal Court in *West*.

This claim to similarity is wholly unjustified for the following reasons:

(i) The Ohio Federal Court opinion involved in *West* acknowledged it was rejecting the State Court decision as bad law. The opinion of the Court of Appeals in the present case cited, considered and distinguished *Lieberman* and made clear that it was determining Illinois law, not substituting its own rule;

(ii) In *West*, the State Court decision involved the same parties and the same cause of action and was indistinguishable from the later federal case; the present case involves different facts and is readily distinguishable from *Lieberman;* and

(iii) More importantly, Ohio law, as involved in *West*, included no data but the Ohio State Court decision rejected by the Ohio Federal Court; however, in the present case there is considerable data as to Illinois law since there has been much litigation in Illinois affecting and controlling the issue in this case.

The ascertainment of Illinois law in compliance with *West* requires the analysis, consideration and reconciliation of many

cases in addition to *Lieberman*, which is by no means the most relevant state court opinion. These cases include:

First National Bank of Highland Park v. *Boston Insurance Co.*, 17 Ill. 2d 147, 160 N.E. 2d 802 (1959).

(a decision by the Illinois Supreme Court which rejected the pecuniary loss limitation urged here by defendants and determined that contracts between the insured and third parties had no effect on insurance recoveries where the fire preceded performance);

DiLeo v. *U. S. Fidelity & Guaranty Co.*, 109 Ill. App. 2d 28, 248 N.E. 2d 669 (1st Dist. 1969).

(which held that a demolition contract, termination of lease and condemnation proceedings all prior to fire did not affect insurable interest);

Knuppel v. *American Ins. Co.*, 269 F. 2d 163 (7th Cir. 1959).

(which held that evidence of intention to demolish was immaterial and inadmissible);

Edlin v. *Security Ins. Co.*, 269 F. 2d 159 (7th Cir. 1959), cert. denied, 361 U. S. 931, 932 (1960), and *American Nat. Bank & Trust Co.* v. *Reserve Ins. Co.*, 38 Ill. App. 2d 315, 187 N.E. 2d 343 (1st Dist. 1962).

(two cases which held that prior condemnation proceedings were irrelevant even though the condemnation award received by the insured was in no way affected by the fire and the insured received both the award and the insurance proceeds).

The teaching of *West* is that state law is to be ascertained from "all the available data". It is elementtal legal principle that *Lieberman* or any other intermediate appellate court decision must be read in a way consistent with the decisions of the Supreme Court of the state and with other relevant decisions. This Court, in *West*, recognized that the federal courts should even disregard any intermediate appellate court decision if the federal court "is convinced by other persuasive data that the

highest court of the state would decide otherwise". (311 U.S. at p. 237).

We respectfully submit that the opinion of the Court of Appeals herein has correctly analyzed *Lieberman*, and reconciled it with the other relevant Illinois decisions. In contrast, defendants' reading of the case would put it in conflict with decisions of the Illinois Supreme Court and other decisions of the Illinois Appellate Courts.

B. THE OPINION OF THE COURT OF APPEALS HEREIN MAKES CLEAR THAT THAT COURT ASCERTAINED AND APPLIED ILLINOIS LAW IN FULL COMPLIANCE WITH WEST. DEFENDANTS' ONLY OBJECTION IS ONE WHICH CANNOT BE A PROPER BASIS FOR CERTIORARI.

The best evidence of what the Court of Appeals has done in the present case is the opinion of that Court. We respectfully submit that any reading of that opinion makes clear that the Court of Appeals for the Seventh Circuit, in fact, duly considered and analytically determined, Illinois law on the basis of all available data, and that it then applied that law to the facts in the record.

The opinion of the Court of Appeals in this case thus demonstrates full compliance with the teaching of *West*.

There is nothing in defendants' petition which challenges this. The thrust of defendants' argument is that the distinction between *Lieberman* and the present case relied upon by the Court of Appeals was, to use their own term, "illusory". This is, indeed, a familiar complaint. Virtually every unsuccessful litigant views the distinctions relied on by the court which rules against him as being illusory.

There is no way for this Court to hear all diversity cases in which a disappointed litigant believes his authorities have been incorrectly distinguished and the Court of Appeals has incorrectly determined state law. And there is nothing in the petition

which suggests such special importance of the issue as is required by Rule 19(1b) of the Supreme Court Rules; nor is there any suggestion of anything special in Illinois insurance law which singles it out for special treatment.

Even if there were substantial justification for defendants' disappointment (and as is indicated below, no such justification exists), there is no basis for certiorari. *West* was clearly not intended to constitute this Court as the final determiner of the content of pure state law questions in diversity cases whenever a disappointed litigant believes the Court of Appeals was in error.

C. THE DIFFERENCES BETWEEN THE PRESENT CASE AND LIEBERMAN ARE SO GREAT THAT THERE CAN BE NO BASIS FOR APPLYING WEST TO JUSTIFY GRANTING OF CERTIORARI IN THE PRESENT CASE.

In *West* the rejection of state law was established in the opinion of the Ohio Federal Court which itself made clear that the case in the Ohio Federal Court was in no way distinguishable from the prior case before the State Court.

This is not true here. The facts in *Lieberman*, which defendants assert played a similar role to the State Court proceeding in *West*, are plainly different from those in the present case. Among the differences between the two cases are the following:

(i) In *Lieberman*, at the time of the fire, the insured's commitment to complete the demolition was specifically enforceable because of special circumstances there present. In the present case there was no basis for specific performance so that the insured (unlike the insured in *Lieberman*) had, at the time of fire, the full power to prevent the commencement of demolition. The possibility that the insured could have been required to pay damages to the demolition contractor based on its lost profit does not affect the insured's control over the fate of the building.

(ii) In *Lieberman*, at the time of fire, physical demolition of the building there at issue had already commenced. In the present case, at the time of fire, the demolition contractor had done neither any demolition work nor any salvage work on the building here at issue.

These are not insignificant factual differences. The issue before the Court of Appeals in the present case was whether, at the time of the fire, the plaintiff's seven-story building should be treated as a building for the purpose of the insurance policy sold by defendants to plaintiff. On this issue, whether demolition has commenced and whether the insured has a specifically enforecable obligation to proceed with actual demolition cannot be dismissed as insignificant.

In fact, the power of the insured to prevent demolition at the cost only of a damage claim has been recognized as a significant factor in many jurisdictions. E.g., *Paterson-Leitch Co.* v. *Insurance Co. of North America*, 366 F. Supp. 749 (N.D. Ohio 1973); *Royal Ins. Co.* v. *Sisters of Presentation*, 430 F. 2d 759 (9th Cir. 1970); 4 Appleman, Insurance Law and Practice, Sec. 2245, note 48, p. 169. Distinctions thus regarded as significant cannot be deemed illusory.

In determining the time when a building should be no longer treated as a building for insurance purposes, a line must be drawn. Focusing on when significant physical demolition has begun and whether the obligation of the insured is specifically enforceable is clearly a reasonable way to draw that line. It is, therefore, not surprising that the insurance company should have prevailed on the facts in *Lieberman* and that the insured should prevail in the present case; these thoroughly predictable results provide no reason for the granting of certiorari in the present case.

D. THE DECISION BY THE COURT OF APPEALS IS REQUIRED BY THE SPECIFIC PROVISIONS OF THE INSURANCE POLICY SOLD BY DEFENDANTS TO PLAINTIFF.

This is an action to enforce a contract.

Defendants acknowledge that Illinois law respects the "integrity of contracts", that it treats contracts as "inviolable" and, more importantly, that "stipulations of the parties are given effect as written. . . ." (Defts' Pet. pp. 12, 18.) Illinois law will not permit defendants to reject their contractual obligations to plaintiff.

1. It Is Determinative of This Case That in Illinois, as Defendants Explicitly Recognize, Contracts Are Enforced as Written.

Under Illinois law an insurance policy is a contract. The insurance company undertakes to pay insurable value in the event of fire. The calculation of insurable value is wholly governed by the terms of the policy. In the present case, there is no doubt that insurable value is equal to cost of reproduction minus depreciation for age and that this value exceeded the policy amount.

The reason defendants must pay the policy amount to plaintiff is simply that this is what defendants *agreed* to do in consideration for the premium paid. As discussed below, there is nothing in the policy which excuses defendants because the demolition contract was signed or because plaintiff may have suffered a pecuniary loss smaller than the policy amount.

Defendants clearly resist paying insurable value in this case because they believe it exceeds the pecuniary loss suffered by plaintiff. But even if this is so, the present case is but one of many examples of this result. The cases cited herein make clear that in such cases, insurable value always controls; the contract is enforced as written. The Illinois courts have wisely insisted that if pecuniary or financial loss is to be injected into

insurance recoveries, it must be done by including provision for this in the policy itself.

Indeed, this principle is often rather dramatically illustrated. In *DiLeo* v. *U. S. Fidelity & Guaranty Co.*, 109 Ill. App. 2d 28, 248 N. E. 2d 669 (1st Dist. 1969), for example, the Illinois Appellate Court, in considering a business interruption policy, followed the policy language precisely in awarding lost profits for the full period required for physical restoration even though the insured's right to occupancy was due to end three days after the fire, and even though a prior condemnation and *demolition contract* would have effectively prevented such restoration.

There is nothing in the holding of *Lieberman* inconsistent with this honoring of the integrity of defendants' contract with plaintiff. The insurance policy insured a "building" and falls by its own terms when the building ceases to exist as such. *Woodruff* v. *Southeastern Fire Ins. Co.*, 426 F. 2d 555 (5th Cir. 1970). But, at the earliest, the status of the building as such can be treated as changed only when the building has been abandoned pursuant to an irrevocable commitment to demolish, the test applied by the Court of Appeals herein. The same test would, when applied to the facts in *Lieberman*, deny recovery to the insured in that case.

2. Plaintiff Was Entitled to Recover Under the Terms of Its Agreement with Defendants.

The following is the critical policy language:

> "[the defendant] does insure the insured . . . to the extent of the actual cash value of the property at the time of loss . . . nor in any event for more than the interest of the insured, against all DIRECT LOSS BY FIRE . . . to the property. . . ." (Insurance Pol., Ex. A to Compl. (2)).

Under this language it is clear that the decision of the Court of Appeals herein was the *only* decision that could

reasonably be expected from a court charged with ascertaining and applying Illinois law for the following reasons:

(i) The measure of damages specified in the policy is "actual cash value". Under Illinois law this clearly means cost of reconstruction minus depreciation for age. *Smith* v. *Allemannia Fire Ins. Co. of Pittsburg*, 219 Ill. App. 506 (1920). This measure of recovery is in no way affected by market value of the building, by the "pecuniary loss" suffered,* by any other valuation concept nor by any estimate or prediction of what would have happened to the building if the fire had not occurred. *First National Bank of Highland Park* v. *Boston Insurance Co.*, 17 Ill. 2d 147, 160 N. E. 2d 802 (1959).

(ii) Under this policy language, the value of the building for loss purposes must be determined "at the time of loss." This focuses attention solely on the condition of the building at the time of the fire. This language makes immaterial any future events which might either be predictable or even certain but which would have occurred after the fire. 4 Appleman, Insurance Law and Practice, Sec. 2245, pp. 167-69; *Bailey* v. *Gulf Ins. Co.*, 406 F. 2d 47 (10th Cir.

* The basic thrust of the law of a jurisdiction is often best indicated by the tenor of criticisms directed against it. So strict is the adherence of the Illinois Courts to awarding insurable value based on reconstruction cost that it has been called "rigid" (*Chicago Title & Trust Co.* v. *U.S. Fidelity & Guaranty Co.*, 72 C 3225 (N.D. Ill. 1973) (see page A24 of defendants' Appendix to Petition) and insurance company counsel has referred to the Illinois rule as one which ". . . will *not* consider *all* the circumstances in valuing a property loss." (emphasis in original) (Stephen Marcus, "Actual Cash Value, Illinois and the Broad Evidence Rule: 'A Modest Proposal' ", 59 Ill. Bar J. 1000, 1009 (1971). Whether these criticisms are just or not, they establish that Illinois law is not receptive to the pecuniary loss concepts urged by defendants. While the issue in this case is to ascertain the rule of law followed by Illinois, rather than to determine what that law ought to be, plaintiff respectfully submits that the Illinois rule is understandable and predictable by purchasers of insurance policies and is a correct and salutory rule.

1969); *DiLeo* v. *U. S. Fidelity & Guaranty Co.*, 109 Ill. App. 2d 28, 248 N. E. 2d 669 (1st Dist. 1969).

(iii) The only limitation dealing with the interest of the insured is the provision limiting recovery to "the interest of the insured," but this limitation has been definitively construed by the Illinois Supreme Court as being fully met if the insured owned the fee simple title at the time of fire. *First National Bank of Highland Park* v. *Boston Insurance Co., supra.*

(iv) The policy insured against "loss . . . to the property" and not loss to the pocketbook of the insured. This requires the insured only to prove injury to the building and does not require him to prove any financial injury to the insured himself. *Federowicz* v. *Potomac Insurance Co. of Dist. of Col.*, 183 N.Y.S. 2d 115, 7 A.D. 2d 330 (1959). (New York Court construing policy language identical to policy in this case).

3. The Only Situation Where Illinois Insurance Law Permits an Insurance Company to Avoid Making the Payment Required Under Its Policy Is Where the Insured Does Not Own the Property and This Exception Has No Relevance in the Present Case.

The only situation in Illinois real property insurance law where the Illinois courts have relieved an insurance company from its contractual obligations is in the limited case where insurance is purchased by one who does not own the insured property. Even then, a non-owner who has a "pecuniary interest" is permitted to purchase insurance.

Defendants have attempted to convert this historic exception (permitting a non-owner to purchase insurance if he has a "pecuniary interest" in the insured property) into a defense which can prevail against one who clearly was the owner. But the cases dealing with rights of non-owners to buy insurance are irrelevant here; where the insured is the fee owner

who properly purchased the insurance, his rights are governed by the policy language.

The *reductio ad absurdum* of this misuse of the cases dealing with purchase of insurance by non-owners is defendants' own mis-citation of the Appleman treatise on insurance. On page 19 of their petition defendants quoted a statement in Appleman out of context. While the statement quoted deals only with the right of non-owners to buy insurance, it is quoted so it could be read to impose a general pecuniary loss limitation on all purchasers of insurance. In fact, Appleman makes clear that the language quoted by defendants has nothing to do with the issue herein since in the section of the treatise dealing with the present issue Appleman states that:

> "The insurable interest of the parties to an insurance contract must be determined by the facts existing at the time of the loss, and such interest is not defeated by unascertained and speculative future events. Thus, the intention of the insured to demolish part or all of the insured property, or even the existence, before loss, of a contract to that effect, has been held not to affect the insurable interest where the property had not been altered or demolished when the loss occurred." (4 Appleman, Insurance Law and Practice, Sec. 2245, pp. 167-69).

II.

THERE IS NO BASIS FOR CONSIDERATION IN THIS CASE OF THE DOCTRINE OF ABSTENTION.

The defendants' alternate request is for "a more liberal application of the doctrine of abstention" (Defts' Pet. p. 21) which would result in relitigating the entire case from the beginning in the state courts.

The sole justification urged by defendants for making abstention obligatory in this case is the alleged "difficulty of the question of state law." (Defts' Pet. p. 21.)

This Court has already held that "difficulty of the question of state law" is not a proper basis for abstention. *Meredith* v. *Winter Haven*, 320 U.S. 228, 88 L. ed. 9, 64 S.Ct. 7 (1943), held it to be error for the Court of Appeals to decline to consider a case merely because the state law was uncertain or difficult to determine.

In substance, by its petition, defendants are asking this Court to reconsider its decision in *Meredith*—and even further—they ask this Court to hold abstention is obligatory under circumstances where in *Meredith* it was not even permissible.

There is no basis for the sharp break with judicial tradition proposed by defendants.

Abstention can serve a useful purpose in a limited number of cases but only where the state courts *have not spoken.* Federal courts normally decline to consider an issue only where an unnecessary or ill-defined constitutional issue can thereby be avoided; it is clear this justification has no applicability in this case.

Defendants make no attempt to characterize the issue herein as one on which the Illinois Courts have been silent. In view of their attempts to characterize Illinois law as being "perfectly clear on the question presented" (Defts' Pet. p. 21), they could not, and did not, go beyond an assertion that the issue was difficult. Moreover, the truth is that there has been considerable litigation in Illinois material to the issue presented to the Court of Appeals in this case (e.g. *First National Bank, DiLeo, Lieberman, Knuppel, Edlin, American National Bank*) and the judicial task of the Court of Appeals was to compare, interpret and reconcile those cases and others. This is the typical task faced by the federal courts in virtually every diversity case.

Because it is such a representative diversity case, permitting abstention here will necessarily either obliterate diversity jurisdiction or initiate chaos while new criteria for selective application of abstention are being developed. Abstention must remain, as it always has been, a limited doctrine confined to highly

special circumstances. There is nothing in this petition which suggests that defendants' request for abstention is anything more than the complaint of a disappointed litigant who would like the chance to relitigate the case again from the beginning in a different court.

In *Meredith* this Court stated, at page 234:

> "The diversity jurisdiction was not conferred for the benefit of the federal courts or to serve their convenience. Its purpose was generally to afford to suitors an opportunity in such cases, at their option, to assert their rights in the federal rather than in the state courts. In the absence of some recognized public policy or defined principle guiding the exercise of the jurisdiction conferred, which would in exceptional cases warrant its non-exercise, it has been from the first deemed to be the duty of the federal courts, if their jurisdiction is properly invoked, to decide questions of state law whenever necessary to the rendition of a judgment."

The Court went on to say at pages 234-35:

> "When such exceptional circumstances are not present, denial of that opportunity by the federal courts merely because the answers to the questions of state law are difficult or uncertain or have not yet been given by the highest court of the state, would thwart the purpose of the jurisdictional act."

Nor was there anything in the character of the issue in *Meredith* which distinguishes it from this case. *Meredith* involved the issue of whether a Florida city had the power to call and retire its bonds. This Court there held that the determination of *that* issue was a decision that the Court of Appeals was required to make, and in this connection, this Court stated, at pages 236-37:

> "The decision of this case is concerned solely with the extent of the liability of the city on its Refunding Bonds. Decision here does not require the federal court to determine or shape state policy governing administrative agen-

> cies. It entails no interference with such agencies or with the state courts. No litigation is pending in the state courts in which the questions here presented could be decided. We are pointed to no public policy or interest which would be served by withholding from petitioners the benefit of the jurisdiction which Congress has created with the purpose that it should be availed of and exercised subject only to such limitations as traditionally justify courts in declining to exercise the jurisdiction which they possess. To remit the parties to the state courts is to delay further the disposition of the litigation which has been pending for more than two years and which is now ready for decision. It is to penalize petitioners for resorting to a jurisdiction which they were entitled to invoke, in the absence of any special circumstances which would warrant a refusal to exercise it."

What was said in *Meredith* applies *a fortiori* in the present case. This case solely involves the liability at law of the defendant insurance companies under insurance policies sold by them. There are no circumstances in the present case that would involve interference with administrative agencies or the state courts. The federal court is sitting in the very state in which the dispute arises. As in *Meredith*, requiring the parties here to litigate in the State courts would compound the more than three years already devoted to this litigation by adding at least three or more years for complete litigation in the State courts.

There is nothing in any of the subsequent decisions by this Court that in any way suggests that the basic principles of *Meredith* do not still control. (See, generally, Annotation on Abstention Doctrine, 20 L.ed. 2d 1623.) Indeed, this Court has indicated that the doctrine is applicable only in narrowly limited "special circumstances" (*Zwickler* v. *Koota*, 389 U.S. 241, 19 L.ed. 2d 444, 88 S.Ct. 391 (1967)), and that it favors only a restricted use of the doctrine. This case does not compare with *Lehman Brothers* v. *Schein*, 42 Law Week 4603 (1974) which involved a New York federal court determining Florida law; the present case involves an Illinois federal court

determining Illinois law by a judge who was formerly an Illinois bar examiner and who practiced for many years in Illinois prior to appointment to the Federal bench. And even in *Lehman Brothers* where the issue was one on which the state courts had not spoken, where the Court of Appeals had determined there were no relevant State court decisions and where there was an expeditious procedure for certifying the issue directly to the Supreme Court of Florida, this Court did not order abstention but rather referred the issue of abstention to the discretion of the Court of Appeals. Defendants would have abstention available to all petitioners who disagree with the way their authorities are analyzed or distinguished. This is hardly consonant with this Court's pronouncement.

CONCLUSION.

Defendants ask this Court to take one of two courses:

(i) To undertake the redetermination of the Illinois law question which has been determined by the Court of Appeals; or

(ii) to order that the Federal Courts abstain from hearing the case so that the parties must begin again from scratch in the State Court.

The petition does not justify consideration by the Supreme Court of either of these courses requested by defendants.

There is nothing in the petition which establishes that, as required by Rule 19 of the Rules of the Supreme Court, the "Court of Appeals . . . has decided an important state . . . question in conflict with applicable state . . . law. . . ." Defendants present nothing but the complaint of a disappointed litigant. Moreover, when all the data bearing on the language of the policy and the determination of Illinois law is considered, defendants have no just complaint; they are being held merely to perform their contract in accordance with established Illinois law. As they themselves have acknowledged, under Illinois law, contracts "will not be rewritten by the Court" (Defts' Pet. p. 12).

There is even less justification for the untimely request for abstention. Defendants' brief itself demonstrates that similar insurance claims have been heard by the Federal Courts for years. This is a typical case for diversity jurisdiction and, even taking defendants' characterization of the issue at face value, it is clearly not a basis for abstention under the decision of this Court in *Meredith*. There is nothing in the petition which suggests any reason for reconsideration of *Meredith*. As defendants' brief also demonstrates, insurance companies are satisfied

to litigate in any court when they win (as indicated by defendants' enthusiastic citation of *Aetna* and other federal decisions they deem favorable to insurance companies) and nourish the hope for brighter days in another forum when they lose. This reaction, although understandable, and perhaps shared by all litigants, cannot be a justification for certiorari.

Defendants' petition is, in fact, frivolous. It should be promptly rejected.

Respectfully submitted,

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